ACTA UNIVERSITATIS SZEGEDIENSIS
DE ATTILA JÓZSEF NOMINATAE

ACTA JURIDICA ET POLITICA

Tomus LIV.
Fasciculus 8.

JÓZSEF HAJDÚ

The Methods of Alternative Dispute Resolution (ADR) in the Sphere of LabourLaw

(The Case of USA, Australia, South Africa and Hungary)

SZEGED
1998

Edit

Comissio Scientiae Studiorum Facultatis Scientiarum Politicarum et Juridicarum Universitatis Szegediensis de Attila József nominatae

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Redigit
KÁROLY TÓTH

Nota
Acta Jur. et Pol. Szeged

Kiadja

a szegedi József Attila Tudományegyetem Állam- és Jogtudományi Karának tudományos bizottsága

BALOGH ELEMÉR, BESENYEI LAJOS, BODNÁR LÁSZLÓ, CZÚCZ OTTÓ, KALTENBACH JENŐ, KATONA TAMÁS, MARTONYI JÁNOS, MOLNÁR IMRE, NAGY FERENC, PACZOLAY PÉTER, POKOL BÉLA, RUSZOLY JÓZSEF, TÓTH LAJOS, TRÓCSÁNYI LÁSZLÓ

Szerkeszti
TÓTH KÁROLY

Kiadványunk rövidítése
Acta Jur. et Pol. Szeged

ISSN 0324–6523 Acta Univ.
ISSN 0563–0606 Acta Jur.

PART ONE[+]

1. General feature of Alternative[1] Dispute Resolution (ADR) System

1.1. What is ADR?

ADR is the term used to describe a variety of processes, techniques and procedures designed to assist individuals in the resolution of work place disputes. The use of the word "alternative" in the ADR indicates that the specific techniques under consideration provides options different from the more costly, protracted and adversarial methods that traditionally have been used to resolve disputes in organizations.

The ADR system provides an informal, voluntary way of resolving work place disputes. This non-traditional approach encourages early resolution to conflicts and allows the parties an opportunity to work through conflicts in a relaxed, non-confrontational environment. Although conflict is considered a negative term, it can provide an opportunity to grow. It can even be a positive experience if it is managed in a positive way. At the ADR, the focus will be on the needs of all parties involved and on the exploration of resolutions that satisfy each participant. While people are encouraged to work out their own solutions, the neutral third party employs learned skills to encourage dialogue and bring about a true understanding of the issues. In each of the ADR options, the third party elicits ideas from the participants to help them reach a mutually agreeable resolution.[2]

ADR offers a variety of types of assistance: conciliation, facilitation and mediation etc. The ADR also offers private counseling. These methods are progressive and offer an alternative atmosphere in which conflicts can be discussed and resolutions reached. All the above mentioned processes include a neutral third party.

a) *Conciliation.* Conciliation works on restoring previously positive relationships. By promoting casual conversation in an informal setting, perhaps away from the workplace, the third party helps the participants better understand their

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[+] The research for this paper was undertaken as part of a large project for the Soros Foundation Research Support Scheme. The author wish to express his thanks to the Soros Foundation which helped finance this project. The author indebted to his colleagues at the Aichi Gakuin University, at the Japan Institute of Labour, at the Faculty of Law of the University of Tokyo and at the Faculty of Law of the Szeged University, Szeged, Hungary in particular Prof. Masahiro Ken Kuwahara, Prof. Kazuo Sugeno, Associate Prof. Takashi Araki, Associate Professor Masahiko Iwamura in Japan and Prof. László Nagy in Hungary and my colleagues who helped to complete this work. Many thanks go to Associate Professor Károly Tóth, who carefully and scrupulously edited this paper. – The author is an assistant professor (Ph.D.) at the Department of Labour Law and Social Security in Szeged University, Szeged, Hungary.

[1] Some experts, among them myself, prefer the term "appropriate" instead of "alternative". The word "appropriate" expresses much more adequately the meaning of the whole system.

[2] Stephen A. *Ficca*, Associate Director for Research Services of Center for Alternative Dispute Resolution, National Institutes of Health, 1997.

conflict. When they have restored trust in each other, they achieve the understanding that allows them to reach an agreement.

b) *Facilitation.* When two parties enter into a facilitation process, their discussions are very much their own. The neutral third party is present to guide and direct the conversation – and any settlement negotiations – by making comments and asking questions. Facilitation is non-intrusive and creates a neutral atmosphere where conflicting parties can air their opinions openly. The facilitator simply serves as a guide to keep the discussion positive and on track.

c) *Mediation.* A mediator is more formally involved than a facilitator. The mediator plays an active role in the discussion between the parties, using proven mediation techniques to bring the parties to a mutually agreeable resolution. The mediator can suggest specific ways to settle conflicts, which the parties can use as long as they both agree with the resolution.[3]

d) *Private Counseling.* The ADR system promotes an atmosphere where parties can simply request advice or "vent" their feelings about a situation. Sometimes, all that is needed is an exploration of all the aspects of a situation, accompanied by an identification of the core issue. A reasonable suggestion often helps the parties to resolve the conflict independently, which is the ultimate goal of the ADR process.

1.2. Interfacing With Formal Systems

Individuals who are involved in a formal system can choose to depart from that system to explore ADR options without jeopardizing their rights within the formal system. Likewise, a person who enters the ADR system may discontinue it at any time and pursue a formal or traditional conflict resolution method. The ADR specialist is aware of time lines associated with formal processes such as EEO complaints, labor/management grievances and administrative grievances. Where parties have to initiate action through a formal program, time frames can be suspended – with the parties' signed approvals – while ADR resolution efforts are explored. If no resolution is achieved, the time frames are reactivated.[4]

1.3. The ADR Specialist/Ombudsperson

The ADR Specialist/Ombudsperson actively listens to the parties who request assistance and works with them to define the nature of the conflict. The employee is informed of all the options available ranging from individual counseling to mediation. The ADR Specialist/Ombudsperson works with the parties involved to choose the most appropriate course of action.

The ADR/Ombudsperson monitors the timing and results of the mediation process. The ADR Specialist is also the contact person for periodic reviews of the system, including analysis of its use and level of success.

The ADR Specialist/Ombudsperson has the following range of responsibilities:

a) intake

b) mediation of certain matters

[3] Ibid.

[4] Ibid.

c) initial counseling
d) referrals
e) scheduling
f) monitoring
g) evaluation.[5]

1.4. Who can use ADR?

The ADR service is open to everyone in the working community. Participants can request assistance for any type of conflict no matter what the nature of the conflict. This includes conflicts that a person may have with an individual outside of the company. All parties enter the system voluntarily.

1.5. What kind of case is appropriate for ADR?

Any conflict can be discussed in the ADR arena. This includes EEO complaints, labor/management grievances, administrative grievances or any other workplace conflict. The ADR Specialist (see details later) will refer the party to another resolution mechanism if the problem is not appropriate for the ADR system.

1.6. What happens in case of the unsatisfaction of the involved parties?

Parties involved in the ADR process are usually satisfied with the ADR resolutions because they were responsible for creating them. All parties should feel that the resolution to a dispute provides a fair way to move forward. However, if any party is not satisfied with a resolution, and they were involved in a formal process, they can return to that formal process. If the parties were not involved in a formal process, they can explore that option as well.

1.7. Who chooses the method of ADR?

The ADR Specialist and the participants choose the method together. The question is given, whether is ADR voluntary for all persons who would be called upon to participate? Yes, it is important that it is a voluntary system. It depends on people creating or actively participating in the creation of their own resolution.

Does the party who initiates the ADR process choose whether or not the mediator will be internal (NIH) or external? The parties are welcome to express a preference. The ADR Specialist will advise them of the different benefits of each type of neutral third party. The ADR Specialist is familiar with all types of disputes, neutral third party skill levels and other relevant factors.[6]

[5] Ibid.
[6] Ibid.

1.8. Some often used legal institutions of dispute resolution

The following institutions are most commonly referred in case of Alternative Dispute Resolution Systems:

a) Arbitration – The submission of a dispute to one or more impartial persons for a final and binding decision.

b) Baseball – (Last-Offer Arbitration) Parties negotiate to the point of impasse, then respectively submit a final offer to the arbitrator whose sole responsibility is to select one or the other.

c) Conciliation – often used interchangeably with Mediation, as a method of dispute settlement whereby parties clarify issues and narrow differences through the aid of a neutral facilitator.

d) Fact-Finding – An investigation of a dispute by an impartial third person who examines the issues and facts in the case, and may issue a report and recommended settlement.

e) Mediation – An intervention in dispute negotiations by an impartial third person, with the purpose of helping the parties to reach their own solution.

f) Med/Arb – Employs a neutral selected to serve as both arbitrator and mediator in a dispute. It combines the voluntary techniques of persuasion and discussion, as in mediation, with an arbitrator's authority to issue a final and binding decision, when necessary

g) Mini-Trial – A structured settlement process in which senior executives of the companies involved meet in the presence of an impartial third person and, after hearing presentations of the merits of each side of the dispute, attempt to formulate a voluntary settlement.

h) Negotiation – A process by which disputants communicate their differences to one another through conference, discussion and compromise, In order to resolve them.

i) Summary Jury Trial – Summary presentations by counsel in complex cases before a jury impaneled to make findings which are advisory, absent the agreement of the parties otherwise.

Naturally, we shall deal with many of the above mentioned forms of alternative dispute resolution in the forthcoming parts of this paper.

1.9. Some wise consideration to avoid litigation through alternative dispute resolution

Since litigation can be very costly, extra effort should be given to resolving disputes short of litigation. Formal, comprehensive litigation risk analysis, which is undertaken with the assistance of an experienced litigator, should be conducted during pre-litigation efforts to resolve disputes. The person involved should know, and quantify, the range of expected litigation results and expenses. Mediation, arbitration and other means of alternative dispute resolution should be considered as less expensive, less time consuming methods of resolution.

Consider adopting a corporate policy that requires efforts to initiate alternative means of dispute resolution for specific types of issues.

Consider the desirability of defining non-litigation dispute resolution methods in contractual dealings with third parties.

If somebody is wary of having certain types of disputes resolved without the rigor and safeguards of litigation, at least consider non-binding forms of dispute resolution. Advisable to hire litigators who have mediation and arbitration experience, and who also have the temperament and ability to enhance resolution of disputes without litigation.

In case of mediation utilize a neutral, trained mediator to invite the adversary person to the mediation table.

Consider committing to associations whose members agree to attempt alternative dispute resolution with other members.

Minimize the risk of undesired results in alternative dispute resolution by utilizing a trial lawyer who is skilled at persuasion, but adept at fostering conciliation. The most persuasive litigator may also be the most effective in persuading the parties that it is in their best interests to settle disputes. Involve someone's business people in his/her efforts at alternative dispute resolution. They are uniquely well-positioned to evaluate the business issues and to fashion creative solutions.

Minimize the disadvantages of alternative dispute resolution by agreeing to carefully delineated discovery and disclosure of positions and defenses.

Alternative dispute resolution is particularly appropriate for resolving emotional issues that can result in out-of-control litigation. For example, employment issues, slander actions and unfair competition issues are good candidates for binding or non-binding mediation or arbitration. Other issues, however, may require litigation. Parties may refuse conciliation because they want to establish a precedent or because their "down side" to litigation is minimal. In such cases, cost-sensitive litigators should be retained.

2. Basic principles for ADR

2.1. Impartiality

A. The racial, ethnic and sexual diversity, it is particularly important that arbitrators actually have expertise on *public law* issues when they are raised. Couple decades ago when the idea of ADR system emerged in the US, many arbitrators at the National Academy of Arbitrators meetings stated that their work was in the area of contract interpretation and did not involve public law – and they didn't want to address the latter. Those are the kinds of arbitrators who should not be appointed in connection with such matters. While the courts must always exercise more review than exists in connection with contract interpretation cases under Steelworkers Trilogy and its progeny where public law issues are involved, the fact of the matter is that choosing arbitrators with capability and background in the employment discrimination arena is both fair and efficient because it makes less likely an effective challenge of awards – and, equally important, it provides more fairness to the parties and confidence in this process.

B. Closely related to all of this is the question of *finance*. Again the American Bar Association protocol states that costs should be shared although the inequities that this could impose upon some employees, particularly low paid workers, must be

accommodated. If both do not have a financial stake in the arbitration process, the process is more likely to be dominated by one side, i.e. the employer.

C. Another aspect of impartiality is the *selection of arbitrators.* Somehow employees affected by it have to brought into the process, a perplexing problem where there is no union. The promotion of employee involvement, under the US National Labor Relations Act and state legislation promoting such institutions as health and safety committees, is more likely to bring into existence an employee group which can be consulted about the establishment and administration of such a procedure. Good public policy dictates that this is important as a matter of economic democracy.

Of some relevance to this issue is the petition currently pending before the Board filed by 37 professors, as well as a complaint issued by the General Counsel[7] which would establish an employee right to representation when discipline or discharge is imposed in the nonunion arena as well as the unionized arena where this is already accepted. The move toward employee participation and statutory protection for employees in disciplinary situations makes it more likely that parties will be consulted about such procedures. And, of course, it is axiomatic that both parties be involved in the selection of the arbitrator. This is why experts think that the American Bar Association (ABA) protocol advocating that each side be provided with the arbitrator's recent decisions and relevant information as well as the ABA has said, institutions which might offer assistance, i.e., "bar associations, legal service associations, civil rights organizations, trade unions, etc."[8]

3. Authority of the arbitrator

If arbitrators are going to play the role of a surrogate for resolution of public law claims, then they must not only provide for standards of liability, but also fashion remedies. This is a problem under the common law of wrongful dismissal and the US Civil Rights Act of 1964, as amended in 1991, where punitive damages are available and where arbitrators have been traditionally reluctant to fashion relief which will sting one side. But for us at the Board, regrettably, this is not a problem because our statute does not provide for punitive damages or fines and thus if arbitrators were appointed in nonunion relationships they could easily provide the relief that our statute does.[9]

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[7] In Materials Research Corp., 262 NLRB 1010 (1982) the Board held that the principle established in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), i.e., that an employee who calls on a union representative to assist in a disciplinary interview is engaged in concerted activity applies to representation for nonunion employees. This was subsequently reversed in E.I. DuPont de Nemours & Co., 289 NLRB 627 (1988) by the Board. Now 37 professors have petitioned the Board to use its rulemaking powers to provide Weingarten representation rights in disciplinary hearings to employees in nonunion workplaces. See Petition for A Rulemaking Proceeding Regarding Weingarten-like Rights in the Nonunion Workplace (November 25, 1996). Moreover the General Counsel has authorized Regional Directors to issue complaints in such cases in order to seek reversal of DuPont. At least one such complaint has already been issued and is currently pending trial. The case is Epilepsy Foundation of N.E. Ohio, 8-CA-28169 and 28264.

[8] William B. *Gould* IV: "Alternative dispute resolution and the National Labor Relations Board: some ruminations about emerging legal issues", National Labor Relations Board,Washington, D.C., 1997.

[9] Ibid.

4. What are the Benefits to Alternative Dispute Resolution?

4.1. Generally

Time and cost savings are two key reasons for considering an Alternative Dispute Resolution method. Parties choosing the less formal ADR methods are able to preserve business relationships, maintain confidentiality and tailor a unique solution to their particular problem. A further benefit of many ADR techniques is to permit parties to take an active role in the final determination of the dispute. Obviously, no dispute resolution process can promise to make everyone 100% happy. However, ADR has characteristics that support a cooperative atmosphere in which conflicting parties can gain insight and work together. The following are some of ADR's positive aspects:

a) *Voluntary & Flexible.* No one is coerced into using ADR. Its procedures offer potential for resolutions that are more effective than those that result from formal procedures with an authority who has decision-making power. People enter the ADR system of their own free will, thus they have a vested interest in the outcome. They can leave ADR if they wish to initiate or return to a formal system.

b) *Non-Judicial.* The parties have decision-making authority in resolving their conflict therefore, they maintain ownership of the process. In ADR, the focus is on resolving the conflict rather than assigning blame. ADR is not win/lose, but rather win/win.

c) *Confidential.* People who participate in ADR can explore resolution options and still protect their right to privacy. All conversations that take place in ADR sessions are private and protected, meaning they do not get formally recorded or placed in any type of file, including personnel files. They are protected from any "subpoena" type action.

d) *Cooperative.* ADR resolutions tend to hold over time because the participants created them utilizing a cooperative form of problem solving. These self-crafted solutions can preserve and improve working relationships.

e) *Follow Up.* After resolutions are reached, there can be follow-up interviews to ask how the parties feel about their work situation and to determine if any further assistance is desired.

f) *Empowering & Creative.* ADR encourages creativity with an atmosphere of freedom. No idea suggested sincerely by a responsible person is dismissed as unrealistic. ORS is committed to making sure that everyone who enters the CADR knows their opinion counts.[10]

A key requirement for the efficient operation of business is the ability to predict potential points of dispute and to provide for their disposition in an efficient manner. Government regulatory agencies and tribunals have increasingly adopted Alternative Dispute Resolution techniques to facilitate the administrative process.

The suitability of an Alternative Dispute Resolution method for a particular dispute must be assessed.

Arbitration, the most popular Alternative Dispute Resolution method, is increasingly being adopted by various industries and commercial groups as an

[10] Stephen A. *Ficca*, ibid.

efficient, effective and binding method to resolve impasses. Arbitration proceedings require the specialized knowledge, skill and experience.

Group members are also able to provide mediation services in situations that require a neutral third person to meet with the parties, analyze the issues and reach a mutually agreeable settlement.

4.2. Time

ADR services can achieve resolution in a shorter length of time than it would take to resolve the same conflict within a formal system. Depending on the nature of the dispute, the ADR process can be completed within 30 to 60 days of the assignment of the third party neutral to the matter.[11]

According to statistics compiled by Judith Resnik, 95 percent of all federal lawsuits settle, most of them on the courthouse steps.[12] Implementation of a carefully considered ADR strategy early in the case – often in the context of a pending court case – can result in a just resolution months or even years earlier than through litigation alone.[13]

4.3. Money

For many routine business disputes, litigation procedures under the rules of court are simply too cumbersome and slow to produce cost-effective results. The discovery process is not based on the notion of obtaining the most relevant information at a reasonable cost, but provides for the discovery of information to lead to the discovery of admissible evidence. Although courts will restrict discovery that is burdensome to a party, often they do so long after any balance between cost and benefit has been lost.

Various studies on negotiations, including an important study by Roger Fisher and William Ury of the Harvard Negotiation Project, confirm that the later in the process settlement is reached, the higher the cost. As the parties dig in their heels, attempt to justify, prove, and bolster their respective positions, they consume more and more time and expense preparing for trial, and the cost of settlement invariably rises. Resolution through ADR frequently enables the parties to eliminate or minimize the expenses of discovery and motion practice – the greatest expenses in litigation – and reach an acceptable resolution earlier in the process.[14]

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[11] Ibid.

[12] See Judith *Resnik*, Falling Faith: Adjudicatory Procedure in Decline (53 U. Chi. L. Rev. 494, 511–12 [1986].

[13] Robert E. *Woods*: What are the Benefits to Alternative Dispute Resolution?, Briggs and Morgan's handbook, "A Guide to Dispute Resolution.", Newsletter, Summer 1995, (http://www.wld.com/id/W01146665619)

[14] Robert E. *Woods*, ibid.

4.4. Results

While routine business disputes are frequently and efficiently resolved through the use of ADR processes, complex cases involving many parties and huge stakes are also suited to resolution using ADR. Some of the largest and most difficult disputes have been resolved through court-ordered mediation. These were cases the parties themselves doubted could ever be settled, given the stakes or emotions involved. Yet, as with most disputes, even highly charged, incredibly complex disputes can be resolved through negotiations when both of the parties appreciate the risks of losing control over the result. In Minnesota, many high-stakes cases of great complexity have been resolved through ADR, including securities fraud class actions, large business disputes, merger and acquisition claims, RICO claims, environmental disasters, and international transactions. The success of ADR in resolving complex cases was noted by the American Bar Association's Standing Committee on Dispute Resolution: The use of ADR to resolve all pending litigation following the L'Ambience Plaza construction collapse in Bridgeport, Connecticut within 20 months of the disaster, a process that involved five judicial bodies, more than 44 plaintiffs, approximately 40 potential defendants, several government agencies, and nearly 200 attorneys, represents a dazzling display of the potential impact of the sophisticated use of ADR in complex cases. J. Michael Keating, Jr., ABA Dispute Resolution Kit. 1989 ADR holds other important advantages in addition to savings of time and money. For example:

a) *Confidentiality of disputes* involving highly sensitive corporate information can often times be assured through an ADR mechanism. In a multimillion-dollar dispute between General Electric and three Ohio utility companies, a federal appeals court confirmed the confidentiality of a summary jury trial.[15] The confidentiality of ADR processes may also minimize future claims of a similar nature, especially in employment/discrimination suits. Business relationships or employer-employee relationships that might otherwise be lost through the acrimony that frequently characterizes litigation, can be preserved. Disputes can be resolved privately and without setting future precedent.

b) Complicated facts can be sifted through and considered with the assistance of industry experts instead of non-expert, lay juries.

c) International disputes can be resolved according to ground rules the parties agree upon in advance, thereby avoiding the uncertainty inherent in being subjected to the jurisdiction of foreign courts. Workplace distractions and the emotional burdens imposed on the individuals involved in litigation, especially in employer-employee disputes, are minimized.[16]

Following this general introduction we shall deal with the methods, regulations, institutions and implementation of the basic ADR ideas in some countries, such as USA, Australia, South Africa and Hungary. This article is only one part of an enormous project, consequently the above mentioned countries were randomly chosen and later on the list will be correctly completed.

[15] [see Cincinnati Gas-Electric Co. v. General Electric Corp., 854 F.2d 900 (6th Cir. 1988), cert. denied, 489 U.S. 1033 (1989)]

[16] Robert E. *Woods*, ibid.

PART TWO
The Alternative Dispute Resolution System in USA

1. Legal framework

Alternative Dispute Resolution (ADR) refers to a wide array of dispute resolution techniques, often involving a neutral third party, that are designed to resolve conflicts consensually. Techniques range from conciliation to mediation to binding arbitration. Although seemingly a recent concept, Phoenician and Greek traders used commercial arbitration agreements,[17] and appointed arbitrators roamed the countryside in the sixth century BC settling civil disputes.[18]

Nowadays, ADR system is employed in local, state and federal courts, the private sector, and all levels of government in US Although enabling legislation is not necessary for its usage, recent laws, regulations, and policy statements have increased its applications within the federal community.

Some of the driving forces for the move to develop and implement ADR programs within the Federal sector were the following legislative initiatives: a) The 1990 and 1996 Administrative Dispute Resolution Act; b) The 1991 Civil Rights Act; c) Executive Order 17871, Labor Management Partnership and d) The Equal Employment Opportunity Commission Guidelines , 29CFR Part 1614. We shall discuss each of them in details later on.

1.1. Laws, regulations, policies

a) A principal reason for the increased usage is the *Administrative Dispute Resolution Act (ADRA).* Enacted in 1990 (Pub. L. No. 101-552; 5 U.S.C. sec. 571 et seq.), it provided explicit authority for federal agencies to use ADR to resolve disputes. It required federal agencies to adopt policies addressing the use of alternative means of dispute resolution for all administrative programs; designate a senior agency official to act as a dispute resolution specialist; provide agency staff training in ADR techniques; and review standard agency contracts and assistance agreements to determine whether to amend them to encourage the use of ADR. In response to the ADRA, and with the encouragement of the now dissolved Administrative Conference of the United States, many agencies began to recognize the benefits of ADR and expanded their ADR programs.

The ADRA expired by its own terms October 1, 1995, except for an extension to October 1, 1999 through the Contracts Dispute Act at 41 U.S.C. sec. 605. Based upon Congressional action, it is expected that the ADRA will be permanently re-authorized sometime in 1996. Senate Bill 1224, which DLA favors, provides strengthened confidentiality provisions, increased ease of access to acquire neutrals, a

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[17] B. *Roth*, R. *Wulff*, C. *Coopers*, THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE, at sec. 1:1, Lawyers Cooperative Publishing (1993), citing F. Kellor, *American Arbitration: Its History, Functions, and Achievements, 3 [Port Washington, N.Y.: Kennikat Press (1948)].*

[18] *Id.* citing G. *Smith, The Greeks Had a Word For It--25 Centuries Ago*, 1, Nos. 4–5 Arb.Mag. 5 (1943).

claim certification level equal to that within the Contract Disputes Act (presently $100,00.00), and approval for the federal government to enter into binding arbitration.

b) In the personnel arena, the *Americans with Disabilities Act of 1990 at 42 U.S.C. sec. 12212* explicitly authorizes the use of a wide range of ADR techniques to resolve disputes.

c) The *Equal Employment Opportunity Regulation at 29 C.F.R. sec. 1614.105 (f)* extends the precomplaint processing period to 90 days when an aggrieved individual agrees to participate in an established agency dispute resolution procedure, and at *sec. 1614.108(b)* the regulation encourages agencies to incorporate ADR techniques into their investigations in order to promote early resolution of formal complaints.

d) *Executive Order No. 12871, "Labor-Management Partnership", October 1, 1993,* requires federal agencies to provide training in consensual methods of dispute resolution as well as interest-based bargaining approaches.

e) *Executive Order No. 12988, "Civil Justice Reform", February 5, 1996,* requires federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States to confirm, prior to filing a complaint, that referring agencies have made an effort to use conciliation processes to reach a settlement. Further, litigation counsel are encouraged to use ADR when informal discussions, negotiations and settlements cannot resolve a claim for or against the United States if ADR contributes to a prompt, fair and efficient resolution.

f) *Executive Order No. 12979, "Agency Procurement Protests", October 25, 1995,* requires agencies which procure supplies and services to establish in-house procedures for resolving bid protests as an alternative to outside forums such as the General Accounting Office.

g) The *Federal Acquisition Regulation at sec. 33.204* encourages agencies to use ADR procedures to the maximum extent practicable. *At sec. 33.210,* it authorizes contracting officers to use ADR to resolve claims except in matters of fraud, or for penalties or forfeitures prescribed by statue or regulation that another Federal agency is specifically authorized to administer, settle, or determine. At *sec. 33.214,* it establishes that if ADR is used after the issuance of a contracting officer's final decision, its use does not constitute a reconsideration of the final decision; and it allows for the use of neutrals to facilitate resolutions. At *sec. 5.202 (a) (15)* and at *sec. 6.302-3(b) (3),* it establishes that contract actions for the use of said neutrals or for an expert participating in any part of an alternative dispute resolution process need not be synopsized and need not be subject to full and open competition. At *sec. 33.214 (b),* it requires contracting officers and contractors to provide written explanations if they reject the other party's request to use ADR.At *sec. 52.233-1 (g)* wherein it incorporates the Contract Disputes Act, it again authorizes the use of ADR to resolve a claim submitted by or to the government if the parties mutually consent to the use of ADR.

h) The *Report of the National Performance Review: "Creating a Government that Works Better & Costs Less", September 7, 1993,* includes recommendations for agencies to expand their use of alternative dispute resolution techniques and to consider budgetary needs for designing and implementing ADR programs as well as training costs for agency staff and hiring of needed neutrals.

i) Two pledges signed by agencies and promulgated by the Office of Management and Budget require increased attention to ADR. The *Federal Procurement Pledge signed on May 16, 1994,* requires agencies to review all contract

disputes for application of ADR techniques; to consider using partnering techniques; to identify and eliminate impediments for using ADR in contract administration and resolution of contract disputes; to participate on governmental teams to expand the use of ADR; and to share experiences of using ADR with each other and the Office of Federal Procurement Policy.

j) The *Performance-Based Service Contracting Pledge signed on October 13, 1994,* which requires defining work in objective, mission-related output terms rather than on how to do the work, includes a requirement to institute a formal, timely conflict resolution mechanism in which pre-award and post-award issues are heard and resolved by an impartial, high level agency official.

k) *Department of Defense Memorandums* have been issued which support the usage of ADR. In a *January 10, 1992* memo, the Deputy Secretary of Defense urged implementation of the ADRA, and delegated to the DoD General Counsel the authority and duties of the Secretary of Defense under the Act. In a *February 18, 1994* memo, the General Counsel of DoD urged implementation of ADR in order to reduce costs, time and dissatisfaction. In a *May 11, 1994* memo, the Under Secretary of Defense announced a program to mediate equal employment opportunity complaints, administrative grievances and other workplace disputes. The program requires the Defense Civilian Personnel Management Service's Office of Complaint Investigations to assess the potential for mediation of cases submitted to it, and when appropriate, recommend/provide mediation before investigation of a case.

l) *Department of Defense Directive Number 5145.5, Alternative Dispute Resolution* was issued April 22, 1996. The Directive establishes policy to implement the Civil Justice Reform Executive Order 12988 and the Report of the National Performance Review. It requires each DoD Component to establish ADR policies and programs, identify and eliminate unnecessary barriers to the use of ADR, appoint a dispute resolution specialist, insure implementation of Executive Order 12988 and the National Performance Review, and provide representatives and information to an ADR Coordinating Committee. The ADR Coordinating Committee is required to facilitate the sharing of ADR information, establish DoD-wide ADR working groups, and request information from Dod Components to evaluate the progress of ADR activities. The Defense Office of Hearing and Appeals is to provide administrative support for the activities of the ADR Coordinating Committee, and help implement the Directive.

1.2. US Department of Labor (DLA) implementation of ADR

On 29 May 1992, the *DLAR 5145.1, Alternative Dispute Resolution Program* was issued. The purpose of the regulation was to implement the ADRA, and to authorize the use of a variety of alternative dispute resolution techniques within the agency. Pursuant to the regulation, a decision not to use ADR, when unassisted negotiation has not been effective, is to be made only after its use has been fully evaluated and discussed with someone within a higher level of supervision. The General Counsel is identified as the agency Dispute Resolution Specialist *(DRS)* (delegable) and Commanders of Primary Level Field Activities are responsible for designating local *Alternative Dispute Resolution Specialists (ADRS).* The ADRS are responsible for administering the DLA ADR program for their activity and to periodically provide the DRS with information on their program's status.

Many field counsels were originally designated as the ADRS. By *letter dated 6 September 1995,* the DLA Deputy Counsel advised that the ADRS should normally be someone other than the Chief Counsel. In the same letter, Chief Counsel were advised to begin reporting uses of ADR using the *DLA ADR Reporting Form.*

On March 15, 1996, *MMPPP PROCLTR 96-09* was issued to reinforce DLA's commitment to make maximum use of ADR in contract disputes when unassisted negotiations are unsuccessful. Pursuant to the PROCLTR, DLA activities are directed to actively consider use of ADR at any stage of a contract dispute. A similar *Memorandum for Commanders, Defense Contract Management Districts,* was issued April 5, 1996.

In late 1993, DLA began an *Alternative Dispute Resolution Pilot Project* offering mediation as a way to resolve Equal Employment Opportunity disputes. In August 1995, draft documents were prepared to permanently incorporate ADR in EEO disputes. A final product, which encompass not only EEO complaints, but also other personnel disputes, came out in 1996.

In late 1995, *Guidelines for Using Alternative Dispute Resolution Techniques for Contract Disputes* were issued on a *test basis* in several field activities. Final guidelines issued in 1996.

In mid 1995, an *Associate Counsel for ADR* position at one field activity was established. Included in the duties are implementation of ADR within DLA and assignment to special Headquarters ADR projects. Pursuant to the responsibilities, the Associate Counsel chairs an *ADR Practice Group*, serves as editor of the *ADR Law Notes*, and edits a web page.

2. Overview of ADR methods in the USA

2.1. Types of ADR

Alternative Dispute Resolution is not an off-the-shelf product. It must be carefully tailored to fit specific disputes and disputants. It is best viewed conceptually as a continuum of both evolving and traditional controversy resolution techniques. These techniques typically employ a neutral third party trained to focus the disputants on their common interests and develop alternatives to costly formal litigation. Each technique has different attributes offering unique resolution possibilities for almost any dispute.

A keystone of a good ADR program is the great diversity of choice. It should bifurcate a complex dispute to apply different ADR techniques to the different issues. It also should have the flexibility of beginning conflict resolution using one ADR technique and ending with another.

Some of the primary ADR techniques used by Government and industry include the following:[19]

1. *Arbitration* is one of the oldest and most popular forms of ADR. Used historically to resolve labor/management and commercial disputes, it is now

[19] Alternative Dispute Resolution, A Resources Guide, published by the United States Office of Personnel Management and the Equal Employment Opportunity Commission; pages I-1 to I–6.

available for use in Government contract issues. Arbitration involves a formal adversarial hearing before a neutral, called the arbitrator, with a relaxed evidentiary standard. The arbitrator is usually a subject matter expert. An arbitrator or an arbitration panel of two or more arbitrators serves as a "private judge" to render an informed decision based on the merits of the dispute. The decision of the arbitrator may be binding on the parties in many private disputes, but non-binding arbitration is the standard when the Government is a party.

2. *Conciliation* is a process in which a third party, called a conciliator, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions. The conciliator may or may not be totally neutral to the interests of the parties. Successful conciliation reduces inflammatory rhetoric and tension, opens channels of communication and facilitates continued negotiations. Frequently, conciliation is used to restore the parties to a pre-dispute status quo, after which other ADR techniques may be applied. Conciliation is also used when parties are unwilling, unable, or unprepared to come to the bargaining table.

3. *Convening* serves primarily to identify the issues and individuals with an interest in a specific controversy. The neutral, called a convenor, is tasked with bringing the parties together to negotiate an acceptable solution. This technique may be helpful in environmental clean-up situations where the identity of interested parties and the nature of issues are uncertain. Once the parties are identified and have had an opportunity to meet, other ADR techniques may be used to resolve the issues.

4. *Early Neutral Evaluation* involves informal presentation by the parties to a neutral with respected credentials for an oral or written evaluation of the parties' positions. The evaluation may be binding or non-binding. Many courts require early neutral evaluation, particularly when the dispute involves technical or factual issues that lend themselves to expert evaluation. It may also be an effective alternative to formal discovery in traditional litigation.

5. *Facilitation* improves the flow of information within a group or among disputing parties. The neutral, called a facilitator, provides procedural direction to enable the group to effectively move through negotiation towards agreement. The facilitator's focus is on the procedural assistance to conflict resolution, compared to a mediator who is more likely to be involved with substantive issues. Consequently, it is common for a mediator to become a facilitator, but not the reverse.

6. *Fact-Finding* or *Neutral Fact-Finding* is an investigative process in which a neutral "fact finder" independently determines facts for a particular dispute after the parties have reached an impasse. It succeeds when the opinion of the neutral carries sufficient weight to move the parties away from impasse, and it deals only with questions of fact, not interpretations of law or policy. As an integral part of the DLA EEO complaint process, fact-finding includes use of independent investigators to gather facts related to a formal complaint of discrimination. The parties benefit by having the facts collected and organized to facilitate negotiations or, if negotiations fail, for traditional litigation.

7. *Interest Based Negotiation* or *Interest Based Bargaining* is an established negotiating technique through which the parties meet to identify and discuss the issues at hand to arrive at a mutually acceptable solution. It is a positive effort by the parties to collaborate, rather than compete, to resolve a joint dispute. The focus of negotiations is on common interests of the parties rather than their relative power or position. The goal is to reduce the importance of how the dispute occurred and create options that satisfy both mutual and individual interests. Interest based negotiations are also referred to as "principled" or "win-win" negotiations. This informal process is one of the most fundamental methods of dispute resolution, offering parties maximum control over the process. It does not necessarily require the use of neutrals.

8. *Litigation*, although not an ADR technique, is intertwined with ADR. Not every case can or should be settled. However, each case proceeding toward litigation benefits by an evaluation for resolution. Consideration of using ADR techniques for resolving an aspect of a case such as merit, quantum, attorney fees, or future obligations is common.

9. *Masters* or *Special Masters* are neutrals appointed by a court in accordance with judicial rules. The master assists the parties to manage discovery, narrow issues, agree to stipulations, find facts, and, occasionally, reach settlement. In non-jury actions, the court may accept the master's findings of fact.

10. *Mediated Arbitration (Med-Arb)* is a combination of mediation and arbitration. Initially, a neutral third party mediates a dispute until the parties reach an impasse. After the impasse, a neutral third party issues a binding or non-binding arbitration decision on the cause of the impasse or any unresolved issues. The disputing parties agree in advance whether the same or a different neutral third party conducts both the mediation and arbitration processes. Use of the same person for both processes creates a problem when the mediator turned arbitrator must ignore previously acquired confidential information.

11. *Mediation*, a favored ADR technique, involves a neutral, called a mediator, who assists the parties in negotiating an agreement. In this voluntary process, the mediator serves as an "agent of reality" to help the parties frame the issues, structure negotiations, and recognize self interests as well as the interests of the other side. Mediators may be, but are not necessarily, subject matter experts concerning the substantive issues in dispute. Mediation is useful in highly polarized disputes where the parties have been unable to engage in a productive dialog on their own. The parties may meet with the mediator together, or individually as the circumstances dictate. An individual meeting between a party and the mediator, called a caucus, allows the party to privately express emotions and core interests before openly defining issues and brainstorming solutions. These private sessions avoid alienation between the parties which might otherwise inhibit open communications. Mediators are not vested with any decision making authority and cannot impose resolution on the parties; the parties make the decision themselves. However, the mediator, like a facilitator, serves as the proponent of the process to keep discussions moving on track.

12. *Minitrial (Mini-trial)* is a misnomer. This technique provides for a summary presentation of evidence by an attorney or other fully informed

representative for each side to decision makers, usually a senior executive from each side. After receiving the evidence, the decision makers privately discuss the case. "Minitrial" is not a small trial; it is a sophisticated and structured settlement technique used to narrow the gap between the parties' perceptions of the dispute and which "facts" are actually in dispute. This hybrid technique can occur with or without a neutral's assistance, but neutrals frequently facilitate the processes for presentation of evidence and discussion among the decision makers, and serve as a mediator to reach a settlement. Mini-trials can be more expensive than most other ADR techniques because the cost of presenting even summary evidence to senior executives is high. Therefore, this process is generally reserved for significant cases involving potential expenditure of substantial time and resources in litigation.

13. *Ombudsman (Ombudsperson)* is an organizationally designated person who confidentially receives, investigates, and facilitates resolution of sensitive complaints. The ombudsman may interview parties, review files, and make recommendations to the disputants, but normally is not empowered to impose solutions. Ombudsmen often work as management advisors to identify and recommend solutions for systemic problems in addition to their focus on disputes from individual complainants.

14. *Partnering* is a preemptive technique to avoid disputes before they arise by building a strong relationship between parties in the early stages of a contract. The goal is for the parties to avoid a major dispute, or alternatively, minimize their disruptive impact, by focusing on the development of a cooperative working relationship rather than an adversarial one. Partnering is a relatively new hybrid form of dispute resolution. In the government, it was initially used almost exclusively for construction contracts. However, it is well suited for contract administration and large scale project management issues. Since the mid `90's, the Defense Contract Management Command of DLA has formed "Process Oriented Contract Administrative Services" (PROCAS) partnering agreements with contractors in many diverse projects to lower overall costs of government contracting by avoiding formal disputes. However, DCMC PROCAS agreements usually are not "partnering agreements" in the ADR sense because they lack contractual power, whereas true partnering agreements typically require dispute resolution processes such as mediation prior to more formal proceedings.

15. *Peer Review Panels* or *Dispute Resolution Panels* use groups or panels to conduct fact-finding inquiries, assess issues, and present a workable resolution to voluntarily resolve disputes. In workplace personnel disputes the panel is generally composed of knowledgeable employees and supervisors. Panels may be standing groups or formed ad hoc from a pool of qualified employees and supervisors. In contract disputes, the panel is often composed of two or more neutral subject matter experts selected by the disputing parties. Decisions of the panel may or may not be binding, depending on the advance agreement of the parties. This method attempts to resolve disputes at their inception to avoid traditional litigation.

16. *Private Judging*, also called "rent-a-judge", is an approach midway between arbitration and litigation in terms of formality and control of the parties. The parties typically present their case to a judge in a privately maintained

courtroom with all the accouterments of the formal judicial process. Private judges are frequently retired or former "public" judges with subject matter expertise. This approach is gaining popularity in commercial situations because disputes can be concluded much quicker than under the traditional court system.

17. *Settlement Conference* is an ADR technique either permitted or required by statute in many jurisdictions as a procedural step before trial. An assigned or jointly selected "settlement judge" typically applies mediation techniques to strongly suggest a specific settlement range based on his or her assessment of the case. However, these judges play a much stronger authoritative role than mediators since they also provide the parties with specific substantive and legal information.

18. *Summary Jury Trial* is a formal but abbreviated trial involving a presentation by the disputing parties to a panel of jurors. This process "reality tests" the case with a non-binding jury verdict to encourage the parties to negotiate for a settlement based upon their new assessment of litigation risk. The summary jury trial should not be confused with a minitrial, an entirely different ADR process.

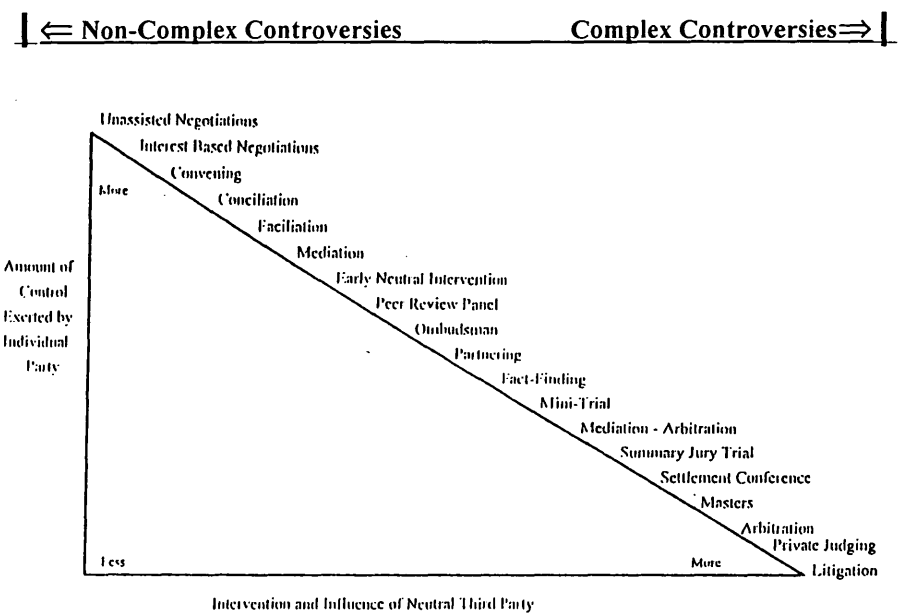
19. *Hybrid ADR* is any creative adaptation of ADR techniques for dispute resolution. ADR has found its niche as an adjunct to traditional litigation because of the financial and emotional cost as well as the other aggravations of formal litigation. Processes leading to less litigation cost or risk may be considered ADR, regardless of the labels used to identify them. The distinguishing characteristic is that the techniques enable parties to acquire sufficient information to evaluate litigation risk and voluntarily negotiate resolution directly with each other. The techniques can be applied in any sequence as long as the parties are moving in good faith toward resolution of all or part of a dispute. Identical fact patterns with different parties may be resolved through different techniques and, conversely, identical parties with different fact patterns may successfully apply the same ADR techniques. Creativity and experimentation are strongly encouraged because acceptance of ADR within the DLA community will only come after familiarity and success is achieved.

2.2. Control of the dispute process

Each ADR technique offers a different balance between the amount of control retained by the parties and the third party neutral. This balance relates directly to the parties' "comfort level. "Generally, the more control retained by the party, the more likely the party will be willing to voluntarily engage in the process. Unassisted negotiation, i.e. when the parties retain all control and act without any neutral, represents one extreme on the control continuum. On the other extreme, traditional litigation offers virtually no control to the disputing parties since the process is bound by established rules and the decision is imposed by a judge or jury.

The chart below (Chart 1) describes the control/intervention balance for ADR techniques. Note that the amount of control relinquished typically relates to the complexity of the controversy. Less complex cases tend to fit into an ADR technique at the top of the chart while the higher dollar, complex cases may fit into any ADR technique, including those near the bottom of the chart.

Chart 1



2.3. The mediation process

Simply put, mediation assists negotiations between disputing parties. As a flexible, informal process, mediation focuses on dispute resolution, not compliance with complicated legal or procedural rules. DLA policy encourages mediation as a reasoned alternative to adversarial or litigation based resolution.

As a process, mediation helps decision makers and decision requesters expedite negotiations, narrow issues in dispute at an early stage, promote "win-win" dialogs, preserve future relationships, and maintain confidentiality while producing mutually agreeable resolutions. Further, it provides the parties with a structured, positive environment to directly discuss their differences, and it increases the likelihood of resolution without the burdens of traditional litigation.

Mediation will likely become the most commonly elected ADR technique used in DLA, so understanding the mediation process is critical. The steps in a typical mediation process are:

1. *Agreeing to Mediate.* Since mediation is voluntary, prior to meeting in mediation the parties must agree that their dispute will be mediated by a qualified mediator. In reaching this preliminary agreement, they should agree on the issues to be mediated and who will be the mediator.

2. *Establishing Rules.* Soon after the mediator is selected, she/he will establish ground rules for the overall process. For example, the mediator will inform the parties that the mediation will be conducted in confidence as a settlement discussion and therefore, information gained or concessions offered cannot be used outside the mediation process. Such ground rules may be set forth in a letter or instruction sheet provided by the mediator in advance of the first meeting.

3. *Introduction.* The mediator begins mediation by introducing and identifying the parties, outlining the issues accepted for mediation, discussing the ground rules, explaining the use of caucuses, and describing how possible settlement options will be developed. She/He will advise that the session will end with a complete settlement, partial settlement, or no settlement. A good introduction develops a framework of reasonableness, engenders the parties' confidence in the mediator, and promotes their ability to work together.

4. *Explaining the Mediator's Role.* The mediator reminds the parties that she/he is neutral at all times and is there to assist the parties in resolving the dispute, not to make resolution recommendations or to represent either party. The mediator also advises the parties that, as a neutral, she/he will not voluntarily testify in any subsequent proceedings about any matter arising in mediation.

5. *Opening.* Opening statements are made first by the initiating party, then by the other party. The mediator will ask questions, set the tempo, and summarize statements for clarity before continuing the mediation. As a courtesy and for clarity, opening statements by one party are not to be interrupted by the other.

6. *Prioritizing.* After opening statements, the mediator prioritizes the issues into a workable problem solving agenda with the parties. Easier issues are often dealt with first to create positive momentum in the negotiations.

7. *Narrowing.* The mediator facilitates discussions with the parties jointly to narrow differences and explore common interests.

8. *Caucusing.* Mediators may also meet with one or more of the parties privately to help develop non-traditional settlement options, evaluate a proposal, or conduct reality testing with a party. This individual meeting is called a caucus and may occur several times during a mediation session. After each caucus, the mediator may caucus with the other party or have the parties jointly discuss issues and potential settlement. No significance should be attached to whether a party is inside or outside the caucus or how long each caucus has lasted. All caucuses are held in confidence; the mediator only discloses information obtained in caucus with permission obtained in advance.

9. *Documenting the Settlement.* If the parties reach resolution, the mediator will prepare a settlement document which all individuals participating in the mediation will sign. Usually, the settlement terms are not final until the document is reviewed and approved by personnel necessary in the review/approval cycle.

10. *Closing.* Closure comes when the mediator thanks the parties (whether or not a settlement was reached) and reminds them of their obligation to keep the proceedings confidential. At this point, mediators will usually destroy any notes

taken during the process, but will note in their file the date and length of time of the mediation session(s) and whether or not a resolution was reached.

11. *Implementing the Settlement.* Each party is responsible for implementing the settlement agreement. However, from time to time mediations are re-opened because the parties have left key questions unanswered which they believe should be resolved by additional mediation. Some mediators, however, cannot reschedule for additional mediation on short notice, so it is incumbent upon the parties to make certain they fully understand every part of their settlement before mediation is closed. If issues are left unsettled, they continue as if mediation had not occurred.

The entire mediation process from introduction to closure can last from several hours to several weeks, depending on the nature of the dispute. However, the vast majority of mediations lead to resolution and are successfully completed in less than one business day.

2.4. Setting and facilities

All formal dispute resolution efforts involving a neutral should be held in a properly equipped conference room either on site or physically as close to the parties as practicable. Although the size, shape, and appointments of available conference rooms vary greatly, certain minimum requirements should be met to ensure that the facility itself does not impede successful negotiations.

Not every item listed below is necessary in each case, but prior to committing to a conference room, the scheduling party should consider whether the proposed facility has:

- enough space to accommodate all parties, witnesses, documents and equipment
- working electrical outlets at convenient locations
- phone service
- proper ventilation, lighting and heating
- soundproofing or sound privacy
- visual privacy (away from direct work area of parties)
- a suitable size and shape table (usually oval or rectangular)
- comfortable chairs
- easy access to rest facilities
- space for parties in and out of caucus
- handicap access if needed
- food and beverage services (including vending machines)
- a blackboard with chalk or flip chart, marker and paper
- a working copy machine
- availability for entire negotiation, including potential rounds of negotiation
- parking available for any offsite participants
- security appropriate to the negotiation
- designated smoking areas, if possible
- no offensive posters, artwork, or other distracting decorations

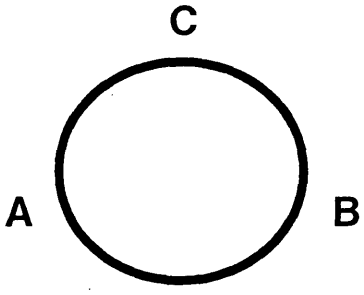
- been cleaned of all clutter and trash
- the perception of neutrality among the disputing parties.

2.5. Various seating arrangements

As King Arthur observed centuries ago with his round table, seating arrangements can be critical to the success of any group meeting. Each seating configuration offers the parties different levels of formality and control. The most common seating options are as follows:[20]

- **Round Table**

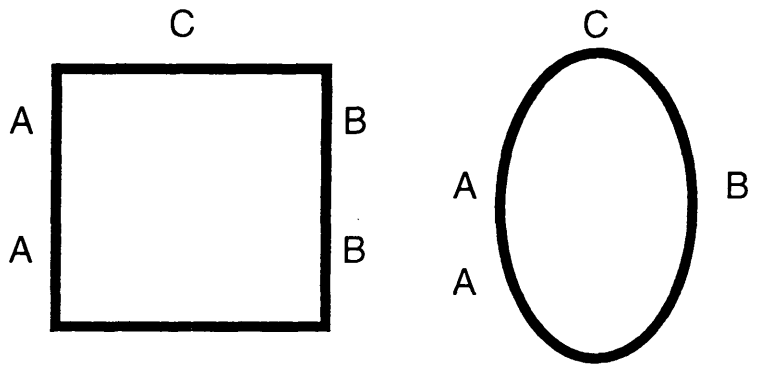
Each party is equidistant from each other offering a feeling of group involvement. This is the least adversarial seating arrangement. It is easy for everyone to see and focus on the speaker, but leading a negotiation is more difficult with this table configuration because there is no head or power seat.



- **Square Table or Oval Table**

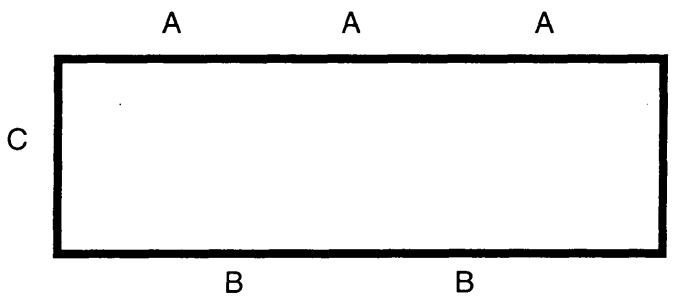
Disputing parties sit opposite each other and the designated neutral sits at either end of the table between the parties. This is a slightly more adversarial seating arrangement than the Round Table, but is better suited for a neutral to lead and control the discussions. It allows the disputing parties to focus on the neutral at the head of the table.

[20] Where A and B are the disputing parties and C is the designated neutral party.



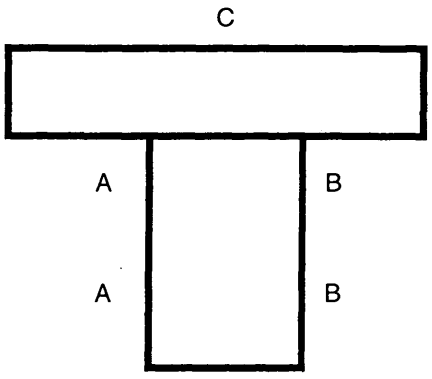
• **Rectangular Table**

This adversarial seating arrangement gives the neutral maximum control. The neutral sits at one end of the table while the disputing parties sit opposite of each other. If there are three or more disputants on one side, visibility of the neutral or other representatives of the same side may be diminished.



• **"T" Table**

The neutral sits at the crossbar of the "T" with disputants sitting opposite each other on the sides of the downstroke. Similar to the Rectangle Table, this formation offers the neutral the ability to control the discussions between the adversarial parties. The addition of the crossbar to the rectangle table gives the neutral greater distance and therefore, greater formality to the negotiation efforts. This formation is advantageous when using co-mediation.



- **"U" Shape and "V" Shape Tables**

These seating arrangements are generally not recommended for dispute resolution efforts when a neutral is involved. These are more suitable for formal presentations with audio visual equipment.(Diagrams intentionally omitted)

3. The role of the alternative dispute resolution specialist

The role of the Alternative Dispute Resolution Specialist (ADRS) is critical to the success of the ADR program. *DLAR 5145.1* specifies that each PLFA Commander will designate an individual to implement the DLA Alternative Dispute Resolution Program for that activity and its subordinate elements. The ADRS is responsible for the following:

a) administration of the DLA ADR program at the PLFA level

b) periodically providing the DLA Dispute Resolution Specialist with information relative to the status of the implementation of the ADR program at that PLFA:

- assisting the parties in selection of an ADR technique after a decision to use ADR has been made
- preparing and reviewing agreements to use an ADR technique
- serving as the ADR point of contact for persons interested in the use of ADR

In this part, we will explore some specific issues and responsibilities the person in charge will face as an ADRS.

3.1. Conflicts of interest

Getting the commitment of the parties to use ADR may be further complicated by client other duties. In DLA, the staff does not have the luxury of being a full time ADRS. The users have other legal duties within his/her office. As a result, they may find themselves facing a conflict of interest at some point in time: a conflict between his/her responsibilities as the ADRS and the responsibilities he/she has to the Agency

by virtue of his/her legal advisor duties. The best way to handle conflicts of interest is to consider what the client would does *before* he/she is faced with that dilemma.

3.2. Facilitating the review and approval process

If someone was successful in getting the parties to use ADR, they may be able to resolve their dispute. If they reach an agreement, the ADRS will have the responsibility for facilitating the Government review and approval process for any agreement the parties reach in resolution of the issues in dispute. The parties' participation in the ADR process does not overcome any requirement for review or approval that would be required if the settlement had been reached outside the ADR process.

Notice to the parties and the neutral of the review and approval process is *critical* so that there is no misconception about the confidentiality of the ADR process. The review and approval process has the potential for causing significant problems if the parties, their representatives, and/or the third party neutrals do not fully understand that the settlement document must be disclosed to those limited personnel who have to review and approve the agreement as well as to those few who will process any actions needed to give effect to the terms of the agreement.

The review and approval process will vary somewhat depending upon the nature of the dispute and the forum in which it has arisen. For example, an ADR agreement in resolution of a formal complaint of discrimination, must be approved by the PLFA Commander. If the settlement terms require that some personnel action be taken or withdrawn, of necessity an employee relations specialist or a staffing specialist may have to review the agreement and/or have access to the agreement to give effect to the agreed-to terms. Parties to the agreement must also be informed that even if the agreement itself need not be disclosed, certain documents may be generated in the course of effecting the terms of the agreement which will not be protected from disclosure (e.g. the SF-50 generated when a disciplinary action is taken will be retained in the employee's official personnel file, not in the ADR case file.)

The ADRS's ability to fully advise the parties and the neutrals of the specifics of the review and approval process will depend upon whether he/she have standard review and approval procedures, or whether he/she will determine the requisite approvals and reviews on a case-by-case basis. The following table (see table 1) may assist the ADRS in identifying potential review/approval personnel at his/her PLFA, in identifying personnel he/she may want to consult relative to the review and approval process, and in determining to what extent the review and approval process can be standardized.

Table 1.

How to identify the potential review/approval personnel

DISCRIMINATION CASES	ADVERSE ACTIONS	GRIEVANCES	CONTRACT DISPUTES
PLFA Commander	Senior Manager or PLFA Commander	Senior Manager or PLFA Commander	PLFA Commander
EEO Manager	Civilian Personnel Officer	Labor Relations Officer [21]	Senior Contracting Executive
Employee Relations Specialist	Employee Relations Specialist	Employee Relations Specialist	Contracting Officer
Staffing Specialist	Personnel Counsel	Staffing Specialist	Contracts Counsel
Personnel Counsel		Personnel Counsel	Fraud Counsel

3.3. Orchestrating payment

Now we had an overview how to manage to get that agreement reviewed and approved, how does the person in need get the appropriate people paid? No special funding sources are currently available for the payment of neutrals used in the ADR process or for payment of monetary settlements reached through ADR. Accordingly, the person in need may decide it is prudent to establish standard operating procedures or check lists to assist him/her in the process of arranging for payment to a neutral or for payment of a monetary settlement to a party, keeping the following information in mind.

3.3.1. Payment to Neutrals

Because no special funding source has been established to pay for the services of neutrals, the ADRS will have to "find" the funds for hiring a neutral on a case-by-case basis. The ADRS will also be responsible for getting an agreement from the parties relative to the payment of any fee. Typically, the parties will split the fee associated with hiring a neutral, especially if one of the parties is a private party or entity. If both parties are Government organizations, the person in need may want to explore the possibility of each organization contributing half of the fee for the neutral. Fee arrangements for neutrals may be an issue that he/she will want to discuss with the PLFA Commander before the need to hire a third-party neutral arises.

Regardless of the ultimate agreement relative to the fee, the "fee arrangement" should be set forth in the agreement to use ADR which the parties execute. A contract will have to be executed between DLA and the neutral for payment of the Government's share of any neutral's fee.

[21] Whether or not the union will be involved in the review process will be dependent upon local union contract provisions, policies, and memoranda of understanding your PLFA has with the union.

3.3.2. Settlement Payments

Likewise, ADR settlements are not paid out of any special fund. The method of payment used to effect the monetary provisions of settlements reached through the ADR process is no different than that used to effect payment in any other case in which we have negotiated a settlement. Settlement terms reached through ADR are subject to all laws, regulations, policies, and collective bargaining agreement provisions that would apply to any settlement agreement. The ADRS is responsible for coordinating the payment of any monetary settlement for which the Agency is responsible through normal fiscal channels. You may also want to monitor any monetary settlement that is to be paid to the Agency pursuant to the terms of an ADR agreement.[22]

3.4. Support for ADR specialists

In the relatively new role as an ADRS, the specialist's techniques and approach to the issues that he/she faces in administration of the ADR program at his/her PLFA will likely change as the specialist gains more and more ADRS experience. As an ADRS, the person will be happy to know that he/she is not alone out there, trying to make the ADR Program a success at his/her PLFA. The following are potential sources from which the potential clients and their colleagues can gain information and support:

- Teleconferences
- Web Page
- ADR Law Notes
- Inter-Agency Seminars.

4. The neutrals

Neutrals are significant players in ADR. Depending upon their role, they can assist parties to reach their own resolutions, provide suggested solutions, or impose solutions upon the parties. No matter what their role, they are pivotal in the outcome of the process.

4.1. Selecting and hiring

- Sources for Neutrals

Neutrals can be found among the ranks of DLA and other government employees, officials in formal forums, community organizations, and private resources. Unless other arrangements have been made, neutrals from DLA activities should be available at no cost except for TDY expenses. Neutrals from

[22] Written in 1994 by Don Fox, Office of the General Counsel, Department of the Air Force. Reprinted with the permission of Mr. Fox and Mr. Joseph McDade, also of the Air Force's Office of General Counsel.

the Federal Mediation and Conciliation Services should be available at little or no charge for labor-management disputes. The legal offices of DLA, the Department of the Air Force, and the Department of the Navy have informally agreed to exchange neutrals at no cost except for TDY expenses. Although no agreements have to date been made with other federal agencies or state or local governments, similar arrangements could be made broadly or on a case by case basis. Neutrals in formal forums such as Judges and Administrative Law Judges will serve as mediators or settlement judges at no cost or at normal forum rates. Numerous community associations, consortiums, private organizations, and individuals are available at negotiated rates.

• Criteria for Selecting a Neutral

Generally, anyone can hang out a shingle and call themselves a neutral. Nevertheless, if the following general standards are met, then the ADR process has a greater opportunity for success.

Training – The neutral should have at least 24 hours of training in the technique for which s/he is serving as a neutral.

Expertise – If the neutral is to serve as an evaluator, then the neutral must have substantial knowledge in the field in which s/he is to give an opinion.

Experience – The neutral should have served as a neutral in at least 3 ADR processes.

Success – Persons involved in the previous processes should be satisfied with the manner in which the neutral handled him/herself. Although you may not be able to talk directly to the disputants due to rules of confidentiality, you can get information from the ADR Specialist and others associated with the previous process.

Characteristics – The neutral should have the intellectual ability to comprehend facts and issues and integrate them; the ability to listen and observe; the ability to direct but not dominate, the ability to draft settlement documents, patience, and objectivity.

Conflict – The neutral cannot have an official, financial or personal conflict with the issue in controversy. If conflict is present, then the person can only continue as the neutral if the conflict is disclosed in writing and all the parties agree in writing to use the person.

• Methods of Selection

Parties to a dispute should agree upon both the method of selection and the person selected. Numerous methods of selection can be used if agreement on a neutral is not immediately reached. For example, a list of neutrals can be lined through by each side on a rotating basis until one name is left; an association, consortium, or other type of organization can provide a neutral from its rosters; or

each party can recommend neutrals who are interviewed by each side until a selection is made. Whatever the method, it is prudent to reduce to writing the terms of the selection process.

• Authority to Select

The ADRA specifically authorizes agencies to enter into contracts for the services of neutrals as well as to use the services of other agency employees as neutrals.

• Sole Source Contracts

Oftentimes, parties who need to hire a neutral will not want to use the competitive procurement process. Pursuant to the Federal Acquisition Regulation (FAR) at section 6.302-3 (a) (2) (iii), full and open competition is not required to acquire the services of an expert for any current or anticipated litigation or dispute. This authority is defined at FAR section 6.302-3 (b) (3) to include acquiring the services of an expert participating in any part of an alternative dispute resolution process as well as acquiring the services of a neutral person to facilitate the resolution of issues in an alternative dispute resolution process.

• Length of Service

Neutrals who serve as conciliators, facilitators, and mediators serve at the will of the parties. The services of other types of neutrals often can only be terminated pursuant to the terms of a contract.

• Payment

As mentioned previously, to date, no special fund has been set aside to pay for the services of neutrals. Consequently, funds will have to be found on a case by case basis. Typically, fees are shared by the disputing parties, particularly if the dispute is between the government and a private party, in order to increase the vested interests of each side in the success of the process. It would be prudent to have the financial officer review the contract prior to finalizing the document.

4.2. Interfacing

The following additional matters need to be discussed with the neutral:

• Logistics

Unless established already, either the ADRS or the neutral will have to work with the disputants to establish place, date and time for the ADR technique.

Provisions for a telephone, computer/notebook, and printer need to be addressed.

The flow of paperwork needs to be established. For example, who will be responsible for providing/retrieving documents to/from the disputants? Who will distribute settlement documents for reviews and approvals?

• Review and Approval of Settlements

As previously mentioned, participation in an ADR process does not change the channels normally used for reviewing and approving settlements. Consequently, settlement documents need to include explicit review/approval language.

• Confidentiality

The ADRA includes a long section on confidentiality, which at first glance, seems to provide for the non-disclosure of dispute resolutions communications.[23] However, the section also includes numerous exceptions to the rule of non-disclosure. These exceptions, married with other sections and with outside agreements and influences, adversely effect the confidential nature of ADR processes. Consequently, everyone involved in an ADR technique should have a clear understanding of what can remain confidential and what may be exposed. For example, a mediated settlement between a management and a bargaining unit member could perhaps, in some form or fashion, be provided to a union if the union could meet its burden of proof that the public interest in seeing the document outweighed the Privacy Act protection of the bargaining unit member who did not want the settlement exposed to the union.

5. The main institutions involved in ADR system in the USA

5.1. Expand the Use of Alternative Dispute Resolution by the US Department of Labor

5.1.1. Background

The litigious nature of labor regulation places a significant burden on the Department of Labor's (hereinafter: DOL's) resources. With more than 24,000 litigation matters reaching the department's 530 attorneys each year, creative methods of dispute resolution are needed to assist the department in handling its cases.[24] One approach which the department should pursue is alternative dispute resolution (ADR).

ADR is any procedure in which the parties to a dispute bring in a neutral party to assist them in reaching agreement and avoiding litigation. In 1990, Congress sought to increase the use of ADR techniques by enacting the Administrative Dispute

[23] See at sec. 584 and 5 USC sec. 574. It is also important to note that to date, the proposed Senate bill permanently re-authorizing the ADRA includes a FOIA exemption for disclosures whereas the House bill does not.

[24] Statistics derived from U.S. Department of Labor (DOL), Annual Report for Fiscal Year 1992 (Washington, D.C., 1992) pp. 115–137 and 218.

Resolution Act, which requires federal agencies to appoint a dispute resolution specialist to consider whether (and under what circumstances) ADR methods can assist the agency in serving the public more effectively.[25] The DOL has issued an ADR Interim Policy to accomplish this task.

As part of the interim policy to explore its possible application to enforcement programs, DOL pilot-tested ADR in its Philadelphia regional office. DOL chose a regional pilot "because it permitted testing ADR across a broad spectrum of DOL programs. In addition, the pilot approach provided the opportunity to experiment with training and administrative issues."[26] The pilot focused on mediation rather than other techniques such as arbitration.

The regional office selected managers from various program offices to receive training in mediation. The managers performed mediation as a collateral duty, providing mediation services for cases arising in offices other than their own. For instance, a mediator from the Occupational Safety and Health Administration (hereinafter: OSHA) would mediate Wage and Hour Division cases, but not OSHA cases.

Most of the cases selected involved OSHA or Wage and Hour violations. This was partly a function of the selection criteria, which had been developed through a public comment process, and partly a result of the mix of cases handled by regional enforcement agencies at the time of the pilot.

Of 32 cases selected for possible mediation, 25 were mediated by the end of the pilot period, three were dropped prior to mediation, and four were still awaiting mediation. Of the 25 cases mediated, 19 resulted in settlement.[27]

DOL evaluated the pilot test by surveying both agency and outside participants, including the mediators. The results suggest that mediation has great potential for use in resolving DOL cases. In particular, the private sector participants indicated that use of in- house mediators was acceptable, although almost half indicated that they would be more comfortable with an outside mediator.[28] That preference was litigated by the use of the Federal Mediation and Conciliation Service (FMCS) to train and provide mentors for the in- house mediators.[29]

The pilot project evaluation yielded a number of recommendations for expansion of the use of ADR. Although initially slow to follow up on these suggestions, the department recently reconvened the steering committee that oversaw the pilot test. ADR will be pursued in concert with DOL's reinvention effort.

In addition to the regional pilot, DOL has a clear opportunity to use ADR in other contexts. For example, the Employment and Training Administration (ETA) has implemented a pilot in the National Office to test the applicability of ADR in resolving disputes involving grants and contracts in the audit resolution/debt collection area. The Office of Administrative Law Judges (OALJ) has recently published procedures for the use of settlement judges to aid the resolution of its cases. DOL is also in the preliminary stages of looking at other areas, such as Equal Employment Opportunity (EEO), where ADR techniques might prove useful.

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[25] Public Law 101–552, codified as 5 U.S.C. 571–583.

[26] U.S. Department of Labor, Alternative Dispute Resolution Steering Committee, Report to the Secretary of Labor on the Philadelphia ADR Pilot Project (October 14, 1992), p. 9.

[27] Ibid., p. 35.

[28] Ibid., p. 40.

[29] Ibid., p. 54.

5.1.2. Affirmative action

DOL should expand the use of Alternative Dispute Resolution. Additional regions should train and deploy mediators, and DOL should continue to pursue new applications. In doing so, DOL should test ADR in areas that were not included in the pilot project because either the cases are not handled at the regional level, or appropriate cases were not found in the Philadelphia region at the time of the pilot.

5.1.3. Implications

ADR involves some up-front investment in training and also can entail absorbing some costs for participants. Although ADR appears to be generally much less expensive and time consuming than litigation, the pilot project report notes some obstacles to assessing ADR's cost impact.[30] For example, the report notes that while the costs of using ADR can be calculated, the cost of not using it is much more difficult to ascertain.[31]

Increased use of in-house mediators also has implications for assessing the performance of DOL programs. During the pilot test, an opinion issued by the Administrative Conference of the United Sates (ACUS) affirmed that DOL would not be misappropriating funds by using personnel to mediate cases outside their assigned divisions. If these cross-program services are to be expanded, they will need to be taken into account when determining whether a particular agency is making effective use of its resources.

5.1.4. Fiscal Impact

Increased reliance on ADR can be expected to produce significant long-term savings as a result of reduced litigation. If a 5 percent reduction in litigation expenses resulted, the savings would be more than $2 million per year. Over the long run, the savings would more than offset the up-front costs of implementing the program nationwide.[32]

5.2. ADR system and the role of the U.S. National Labor Relations Board

The ADR is achieving increasing significance in national labor. It is a matter which the National Labor Relations Board (hereinafter: NLRB) has not yet had the opportunity to address, though cases may come before the NLRB in the near future.

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[30] With few exceptions, little analysis of the cost implications of ADR has been performed by federal agencies. DOL recently initiated a more thorough review of the cost impact of its pilot project. The methods used may prove useful to other agencies in planning the use of ADR techniques.

[31] DOL, Report to the Secretary of Labor on the Philadelphia ADR Pilot Project, 1995, p. 37.

[32] DOL, Report to the Secretary of Labor on the Philadelphia ADR Pilot Project, 1995, p. 34.

And it is an issue of particular significance in the nonunion sector which constitutes about 90 percent of the private sector US workforce.[33]

Alternative dispute resolution is likely to occupy the attention of the Congress, the Court and the Board in the very near future. Within the confines and parameters of Supreme Court authority in the arbitration arena, the Board is writing on a relatively blank slate and will continue to do so until and unless the Congress or the Court speaks first.

Grievance arbitration is a long established and well accepted procedure in the unionized sector of the workforce. The process dates back to the 1920s and has been endorsed by the U.S. Supreme Court in the Steelworkers Trilogy[34] as a cornerstone of the U.S. national labor policy. Well established safeguards for employees and employers are contained in collective bargaining agreements, in procedures and protocols of the National Academy of Arbitrators, the American Arbitration Association and in the law.

Using arbitration to resolve employment disputes in the nonunionized sector of the economy is a more recent but rapidly growing practice, a phenomenon accelerated by both emergence of numerous employment-related statues and wrongful discharge actions. Anybody may recall a report[35] that was done by the California Bar Ad Hoc Committee on Wrongful Dismissals, which recommended legislation providing for arbitration of wrongful discharge disputes in the nonunion arena. Those proposals never became law in California or in any major jurisdiction. But now the adoption of alternative dispute resolution procedures by nonunion employees is moving forward.

The Dunlop Commission, examined the use of arbitration, mediation and other forms of private dispute resolution. It concluded that private parties should be encouraged to adopt in-house alternative dispute resolution systems, and that private arbitration systems should meet certain standards for fairness. The Commission's 1994 final reported: The challenge is how to encourage the creative potential of alternatives to standard court litigation, while ensuring that the legal needs and priorities of a diverse American work force are fairly satisfied.[36]

As it widely known, more than two decades ago a unanimous United States Supreme Court held that, where employees covered by a collective bargaining agreement sue under anti-discrimination and related legislation, they have the right to obtain access to the courts in a de novo proceeding regardless of the existence of an arbitration clause and the resolution of the matter before an arbitrator.[37] Subsequently,

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[33] William B. *Gould* IV: "Alternative dispute resolution and the National Labor Relations Board: some ruminations about emerging legal issues", National Labor Relations Board, Washington, D.C., 1997

[34] United Steelworkers v. American Manufacturing Co. 363 U.S. 564 (1960); United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

[35] *Gould, Estes, Rudy, Wise, Hay, McClain*, To Strike a New Balance, A report of the Adhoc Committee on Termination at Will and Wrongful Discharge Appointed by the Labor and Employment Law Section of the State Bar of California, February 8, 1984. (On file at Stanford Law School.) Mr. Hay and Ms. McClain, a former student of mine at Stanford Law School and a member of the National Labor relations Board Management Advisory Panel, dissented from some key portions of the report.

[36] Report and Recommendations, Commission on the Future of Worker-Management Relations, December 1994, p. 27.

[37] Alexander v. Gardner-Denver, supra. See also McDonald v. City of West Branch, 466 U.S. 284 (1984).

in a case which has produced a torrent of scholarly critiques,[38] the Court in the Gilmer case[39] sent signals that very different rules might well apply in the nonunion sector, precluding employees from suing where an arbitration procedure is in place for individuals where the contract is said to be part of the individual contract of employment.[40]

5.3. Overview of the American Arbitration Association

5.3.1. General overview of the American Arbitration Association

A growing number of corporate counsel around the world have recognized the value of mediation as an integral part of sound legal and business planning. A skilled mediator can help a company reduce legal expenses, manage disputes and maintain business relationships. The American Arbitration Association (hereinafter: AAA), a setter of standards since its establishment in 1926, now offers the President's Panel of Mediators, a select cadre of the most seasoned and experienced mediators in the nation.

The American Arbitration Association (AAA) has, for seventy years. Founded in 1926, the American Arbitration Association is the nation's premier provider of ADR services. A not-for-profit, public service organization, the Association is dedicated to the resolution of disputes through the use of mediation, arbitration, negotiation, elections and other voluntary dispute resolution methodologies. The AAA, which has 38 offices nationwide and 53 cooperative agreements with arbitral institutions in 35 other countries, provides a forum for the hearing of disputes, case administration, tested rules and procedures, and an unmatched roster of impartial experts to hear and resolve cases.[41] It pioneered the alternative dispute resolution (ADR) movement to its present level of acceptability and application in virtually every area of public and private life. A not-for-profit, public service organization, the Association is the largest full-service ADR provider dedicated to the resolution of disputes through the use of arbitration, mediation, negotiation, elections and other out-of-court settlement procedures.

The Association does not decide cases. Rather, it provides a forum for the hearing of disputes, tested rules and procedures that have broad acceptance, and a roster of nearly 15,000 impartial experts to hear and resolve cases. Recognized for

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[38] See e.g., Matthew W. *Finkin*, 'Workers' Contracts' Under the United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. EMP. & LAB. L. 282 (1996); Martin H. Malin, arbitrating Statutory Employment Claims In the Aftermath of Gilmer, 40 ST. LOUIS U. L.J. 77 (1996); Robert A. Gorman, The Gilmer Decision and the Private Arbitration of Public Law Disputes, 1995 U. ILL. L. REV. 635; Hoyman & Stallworth, The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver, 39 ARB. J. 49 (Sept. 1984); Stallworth & Malin, Conflicts Arising Out of Workforce Diversity, Proceedings of the 46th Annual Meeting of the National Academy of Arbitrators 104 (1994) and Christine Nicholson, Reconciling 'Alexander,' 'Gilmer' and 'Hawaiian Airlines' (unpublished paper for Georgetown University Law Center L.L.M., 1995).

[39] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[40] William B. *Gould* IV: "Alternative dispute resolution and the National Labor Relations Board: some ruminations about emerging legal issues", National Labor Relations Board, Washington, D.C., 1997

[41] A Message from the President, Welcome to the American Arbitration Association's World Wide Web page.

their standing and expertise in their fields, their integrity and their dispute resolution skills, neutrals are nominated to the Association's National Roster by leaders in their industry or profession. Their conduct is guided by the Association's Code of Ethics, prepared by a Joint Committee of the American Arbitration Association and the American Bar Association and the Model Standards of Conduct for Mediators, developed by the American Arbitration Association, the American Bar Association and the Society of Professionals in Dispute Resolution.

While nearly 90 % of the 62,000 cases administered by the American Arbitration Association in 1995 were settled through arbitration, less formal methods of dispute resolution – such as mediation, fact-finding, mini-trial and partnering – are clearly coming into wider use. The Association is the largest single repository of information on alternative dispute resolution law and practice.

The American Arbitration Association's unique contributions from its more than 13,000 members enable the development and dissemination of information, training and topical materials as the means for expanded application of alternative dispute settlement systems.[42]

As a not-for-profit organization, the American Arbitration Association is dedicated to providing education and training for those involved in dispute resolution as neutrals and advocates. The Association conducts hundreds of conferences, workshops and skill-building sessions throughout the world each year on dispute management and resolution techniques. In addition, the Association's senior-level staff develops and conducts in-house training seminars at the request of corporations, unions, government agencies and legal organizations.

5.3. 2. Objectives and mission of the American Arbitration Association

Article II of the Bylaws of the American Arbitration Association specifies that the *objectives* of the Association are to study, research, promote, establish and administer procedures for the resolution of disputes of all kinds through the use of arbitration, mediation, conciliation, negotiation, democratic elections and other voluntary procedures.

Mission Statement. The American Arbitration Association is dedicated to the development and widespread use of prompt, effective and economical methods of dispute resolution. As a not-for-profit organization our mission is one of service and education.

The Association is committed to providing exceptional neutrals, proficient case management, dedicated personnel, advanced education and training, and innovative process knowledge to meet the conflict management and dispute resolution needs of the public now and in the future.

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[42] The Association produces a number of newsletters, videotapes and periodicals, including the award-winning Dispute Resolution Journal, which offer authoritative articles, editorial views and reports on the current spectrum of alternative dispute resolution. The Dispute Resolution Journal and the Association's rules, procedures and sample contract clauses are also available in hard-copy format upon request by mail or facsimile.

5.3.3. History

In post-World War I America, as public courts were flooded with cases, the business community became increasingly interested in private arbitration tribunals. It became clear, however, in order to enhance arbitration's effectiveness, that the common law governing arbitration would have to be changed. Legislation, giving parties the freedom to enforce arbitration clauses, became a prime objective for the business community in meeting its dispute resolution needs.

Inspired by Julian Cohen's Commercial Arbitration and the Law, the New York Chamber of Commerce and the New York State Bar Association co-sponsored arbitration legislation. In 1920, New York became the first state to enact a modern arbitration statute making arbitration clauses in contracts enforceable. The law put the power of the New York courts behind arbitration agreements and broke the ice for other states and the federal government to do the same.

In 1922, business leaders created a new organization called the Arbitration Society of America. The Society began with a strictly educational mission aimed at advancing the use of arbitration. It recognized that in order for arbitration to flourish, extensive education and lobbying would be necessary. Its periodical, the Arbitration News, was successful at spreading the word on arbitration. In 1925, Congress enacted the Federal Arbitration Act, which enforced arbitration clauses in interstate contracts, thus providing a firm foundation for the modern form of business arbitration we know today.

The Society gathered momentum and moved from being a primarily educational institution toward becoming a full service dispute resolution organization. In addition to the need for more legislation, the Society recognized that contract clauses and procedural rules needed to be designed, and arbitration panels would have to be established.

Meanwhile, in 1924, another arbitration organization was formed. The Arbitration Foundation, as it was called, took a more conservative approach than did the Society, devoting its efforts to research rather than action. The Foundation depended on private grants, and at first was criticized by the Society for lacking a "democratic approach" in not reaching out to a broad base of potential users. A standoff developed between the Society's practicing lawyers and businessmen, and the Foundation's major commercial interests.

Leaders on both sides tried to reconcile the differences between the organizations. Negotiations continued for more than a year. In 1926, with the help of a mediator, a negotiated settlement was reached and resulted in the merger of the Society and Foundation into a single organization called the American Arbitration Association.

5.3.4. Operations of the American Arbitration Association

A. Washington group

The *Washington Group* is comprised of a number of national and regional activities under the direction of Senior Vice President. The Association's

representative in the nation's capital, this group is responsible for liaison with key industry groups and the federal judiciary.

Government Relations – This office maintains liaison with federal government agencies and congressional offices in order to serve as an information resource on the Association and dispute resolution mechanisms. Upon invitation, the Vice President testifies and advises on pending legislation. The office also works with regional offices throughout the country and maintains a separate, national panel of arbitrators and mediators for government contract disputes.

Dispute Avoidance and Resolution Task Force (DART) – DART was formed in 1991 as an industry-wide coalition to promote awareness, understanding and the use of private dispute prevention and resolution techniques and to encourage the use of these techniques as standard practice for the construction industry. DART represents all segments of the industry: public and private owners, architects, engineers, contractors, subcontractors, sureties, insurers and lenders. DART is directed by an independent industry steering committee chaired by AAA Executive Committee member Bill Baker and an AAA advisory committee.

Regional Office – This office provides case administration and election services for the District of Columbia, Maryland, and Virginia, as well as for selected national caseloads.

B. Regional sectors

The Association's regional office network is comprised of three sectors: Northeast, Mid-West/South, and West. In 1994, the Association's Washington, D.C. office was restructured to better carry out its primary mission: to educate executive branch agencies about ADR and to be available as an educational resource for elected officials considering legislation with ADR provisions.

Each sector is comprised of a number of regional offices, organized to serve as effective, discrete business units. Respective regional offices are headed by either a Regional Vice President or a Director of Regional Development. The Regional Vice President of each office reports to a Senior Vice President of that sector who oversees all activities, including business development, membership, case administration, and education.

6. Case process considerations

6.1. The case file

A case file should be opened each time a request for ADR is made. Information in the file should include: names, phone numbers, organization, supervisors, and rank for each of the disputing parties; dates of when the dispute started, when the parties agreed to use ADR, and when the ADR technique was used; the substance of the dispute and the monetary value, if any, of the dispute; what ADR technique was used; whether or not a settlement was reached; and the estimated cost savings and/or liability

avoided through the use of ADR. The file should also include copies of the agreement to use ADR, and completed copies of the DLA ADR Reporting Form.[43]

6.2. The client

As previously mentioned, although at least two people are involved in every dispute, it is likely that only one person will first approach the ADRS about using ADR. In the personnel arena, they include a supervisor who has a problem employee, an employee who has a problem supervisor, an employee who has a conflict with a fellow employee, an EEO counselor working an informal complaint, the personnel specialist reviewing a disciplinary action, the employee assistance specialist working a dispute, a personnel attorney in the office working a case, an outside attorney hired by an employee, or even Command which has a problem section/unit/group. In the contracts arena, they include the contracting officer, other procurement personnel, a contracts attorney in the office, or outside counsel hired by a contractor.

6.3. Determining if the case is appropriate for ADR

Generally, most cases are subjects for ADR. Nevertheless, the ADRA requires that agencies at least consider not using a dispute resolution proceeding if: authoritative precedent, agency recommended policy, maintenance of established policy, or a full public record is needed; matters significantly affect third parties not subject to the proceeding; or the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition in light of changed circumstances.

6.4. Choosing the best ADR technique for the dispute

ADRS may be asked to arrange for a specific ADR technique, he/she may be asked to recommend a technique, or he/she might want to encourage the use of one or more techniques. The following are matters to consider, when determining which technique is best for a given dispute.

- Dollar value of the dispute – the lower the value, the less complex the technique
- Cost of the ADR technique – facilitators, mediators, ombudspersons, and conciliators are often available at minimal or no cost
- Need for confidentiality – in addition to provisions of the ADRA, many techniques can be tailored to provide for additional confidentiality
- Time needed for a resolution – the less time available, the less complex the technique
- Time limitations – if filing deadlines are neither tolled nor extended, then the technique must include considerations of the parties using two dispute resolution paths simultaneously e.g. of extending a filing deadline – the

[43] Other than the DLA Reporting Form, these documents are provided only as examples and should be modified or replaced as necessary.

precomplaint processing period in EEO cases is extended to 90 days if the agency has an established dispute resolution procedure and the aggrieved individual agrees to participate in the procedure[44]

e.g. of not extending the filing deadline – an aggrieved person must file a discrimination complaint within 15 days of receipt of notice from the EEO Counselor of the right to file a complaint even if the person has agreed to mediate the dispute

e.g. of not extending the filing deadline – a contractor must timely file an appeal from a final decision even though the contractor has agreed to use ADR

e.g. of discretionary right to stay formal action – the administrative judge in an EEO matter has the authority to stay a hearing if the parties advise they wish to use ADR to attempt to resolve the conflict.

• Need for a factfinder, determiner of law, or forum to express emotions – when the conflict centers on differing opinions of a material fact or a question of law, then factfinders or evaluators or decision makers are useful; whereas, when one or both parties principally need to "be heard" to resolve the conflict, then techniques which allow the parties more control may be the better choices

• Already in a formal forum – Boards and Courts have ADR programs that can be used, or stays can be requested in order to engage in independent processes

• Personalities – with significant personality clashes between and among the parties or representatives, it may be prudent to use ADR techniques that involve other individuals in the resolution

• Agency policy of favored technique – the favored DLA ADR EEO technique is mediation

• Availability of people – some techniques require commitment of time from those not directly a part of the dispute such as in a mini-trial which requires the presence of senior executives who are not emotionally involved in the conflict

• Labor/Management agreements – collective bargaining agreements might address the manner in which ADR is implemented.

6.5. Litigation risk analysis

At some point after determining the dispute is the type of case that is appropriate for ADR, it often will be prudent to confirm the parties have completed a risk analysis of taking their dispute to litigation/hearing.[45] Risk analysis includes determining: the costs of actually going to trial, the cost of losing or winning the case, and the potential of losing the case.

Costs of actually going to trial include: salaries, travel, hotel, food, witness fees, and transcripts as they relate to the trial and to any appeals; loss of attention to other business matters; effect of the process on the parties; and damage to relationships.

Costs of losing or winning the case include: judgment awards including compensatory and consequential damages, attorney fees, and punitive damages; time

[44] 29 C.F.R. sec. 1614.105 (f)

[45] Numerous courses and references are available for those interested in a thorough understanding of this topic.

value of money; attorney fees; precedential value of decision and other findings by the decision maker; damage to relationships; effect of publicity; and impact on productivity.

Matters to consider when determining the potential for winning or losing the case include: how definitive are the facts; the value of uncertain facts; credibility, availability, and presentation of the witnesses; available law; the value of the uncontrollables; and the perceptions of the facts and the law by the other side.

6. 6. Interfacing

The ADRS will interface with parties to the conflict, their representatives, neutrals used for the ADR process, approving and reviewing authorities as well as many others. Many of the methods ADRS use will be of his/her own design. The following should be considered when determining the ADRS' strategies:

- How much should his/her prepares the participant/representative for the specific ADR technique?
- When would he/she recommends hiring a private neutral in lieu of using a government employee?
- What is his/her role when a conflict arises between a Union's interest in reviewing an ADR settlement document and the participant's interest in keeping it private?
- What if a settlement document should normally be reviewed by the litigation attorney and he/she is that person?
- What happens if the terms of the agreement are not acceptable to the approving authorities?
- What is ADRS' role when a party to a mediated agreement a month later does not like the terms of the agreement?

7. Marketing in ADR

ADR has consistently gained in popularity over the years. Nevertheless, it still need to market the concept of using alternative methods to resolve disputes. The following is provided to assist somebody in need in overcoming such obstacles as apprehension and mistrust which he/she will face in this function.

7.1. Get command commitment

- Policy Statement from local Command

A policy statement from the person's local Command which supports the utilization of ADR will be of great assistance in his/her efforts to institutionalize ADR.

7.2. Stress the attributes of ADR

The chances of succeeding with ADR are greater if both sides are familiar with ADR, believe it holds a real promise of dispute resolution, and is worth pursuing. However, since ADR is a relatively new phenomenon within the Government, there is a natural hesitation to give ADR a try.

7.3. Building the motivation to try ADR by stressing its many attributes.

- *Faster* – ADR can be used early on in the dispute process before the parties have expended significant sums of money entrenching their positions. Decisions from Courts and Boards can take years.

- *Flexible* – ADR can result in flexible decisions whereas judicial decisions may be all or nothing. ADR can also result in more flexible negotiations due to less peer pressure on negotiators to maintain an organizational position.

- *Informal* – The various ADR methods are significantly more informal than proceedings before a Court or Board.

- *Customer Satisfaction* – Traditional litigation takes time and money, diverts resources and attention from other concerns and business, and often results in resolutions that only one side or neither side finds acceptable. ADR techniques provide opportunities for disputants: 1) to develop and/or preserve good working relations while settling their problem; 2) to be satisfied with a resolution because they devise it themselves; and 3) to reach a resolution without the expense of a lot of time or money.

- *Better Business Sense* – While litigation costs of discovery and expert witnesses have always been a consideration, they have assumed an even greater role in the face of government and corporate downsizing, reduced budgets, and diminishing resources.

- *Control* – ADR allows the disputants to maintain control over the decision rather than leaving it to an adjudicative body.

- *Economic Benefits* – The use of ADR can result in substantial cost savings because it contemplates using streamlined procedures over a fairly brief time period.

7.4. Encourage union involvement

The institutionalizing of an ADR program may require union agreement as it relates to its bargaining unit members. To date, DLA Headquarters has not bargained with any national union on this matter. Consequently, the ADRS should work with union officers to establish mutually satisfactory methods of utilizing ADR processes.

7.5. Discuss DLA ADR initiatives

• Players

DLA has designated a senior official the Dispute Resolution Specialist; assigned an Associate Counsel to both headquarters and the field to implement the ADR program; designated ADR Specialists within each field activity; and provides third party neutrals.

• Programs

DSCC and DPSC regularly use ADR techniques to settle EEO disputes when the informal counseling process does not resolve the conflict.

Legal offices in several field activities are regularly reviewing all types of disputes for ADR suitability.

Partnership Councils comprised of labor and management representatives have been established in many field activities.

An Equal Employment Opportunity Alternative Disputes Resolution Program was drafted for use DLA wide. The Program favors mediation as the ADR technique of choice and affords the advantages of both centralized support and local autonomy.

A joint labor/management team has been tasked with the development and deployment of a model ADR process which can be used throughout the agency for the resolution of labor/management disputes. Field activities will be able to use the model, but will not be limited to it.

Six DLA Primary Level Field Activities are participating in the ADR Practice Group pilot project in which the "Guidelines for Using Alternative Dispute Resolution Techniques for Contract Disputes" are being tested. The participating activities include the Defense Contract Management District Northeast, the Defense Personnel Supply Center, the Defense Industrial Supply Center, the Defense Electronic Supply Center, the Defense Reutilization and Marketing Service (DRMS) – Columbus, and the Defense Supply Center Columbus.

• Practice Group

A thirty-five member ADR practice group has been established within the Office of General Counsel. The group publishes an ADR newsletter which circulates within the Agency, has a Homepage on the Internet, and has joint initiatives with other Defense agencies. These initiatives include sharing neutrals, sharing Homepage pointers, and issuing an ADR Bulletin.

• Reporting Form

DLA has developed a reporting form to track the use of ADR within the Agency and to gather statistical data.

7.6. Provide examples of ADR use by other agencies

• Army – The Army uses ADR to resolve personnel, labor, medical malpractice, and family issues. The Army Corps of Engineers has been a pioneer in the use of ADR techniques, particularly minitrials and partnering. The Corps has also successfully used non-binding arbitration, settlement judges, mediation, and dispute review panels to address its many construction contract disputes.

• Air Force – The Air Force focuses its ADR efforts on personnel, labor, contract and environmental disputes using mediation, minitrials, summary jury trials and settlement judges. The most successful use of ADR for the Air Force is resolving discrimination complaints and grievances. The Air Force also has been successful in resolving a number of contract disputes using ADR, usually employing the ASBCA's procedures.

• Navy – The Navy has been actively engaged in finding alternative ways of resolving disputes since 1986 when then Secretary Lehman in the first Department of Navy policy on Alternative Dispute Resolution concluded that "every reasonable step must be taken to resolve disputes prior to litigation. "The Navy has enjoyed the fruits of ADR in a variety of ways. For example, in 1990, the Human Resources Office and the Equal Employment Opportunity Office at the Marine Corps facility in Beaufort, South Carolina jointly launched an ADR program to facilitate the conflict resolution conducted by their respective offices. Since the program's inception, all workplace disputes have been satisfactorily resolved without resorting to third party hearings or externally imposed decisions. Over the last several years, the Naval Facilities Engineering Command (NAVFAC) has partnered more than 100 major construction contracts. The Navy has also effectively used ADR in the environmental arena by finding new ways for the regulated to work with the regulators. Furthermore, Navy litigators have resolved numerous cases before the ASBCA utilizing ADR procedures and in one recent case, saved $1.5 million and 18 months time utilizing an ADR minitrial.

• Veterans Administration – The Veterans Administration began using ADR in contract proceedings in 1991 and for the most part uses settlement judges. The VA was the first agency to institute a pilot program to provide neutral board judges to assist the parties in resolving pre-appeal contract disputes and issues in controversy.

• General Accounting Office – The GSA has initiated a two year pilot program to resolve contract claims and tracks ADR use to quantify savings and other benefits.

• Defense Contract Management Agency – The DCAA has used ADR in the personnel and labor-management area.

7.7. Promote board ADR procedures

• Contract Disputes Act/Boards of Contract Appeals

The Contract Disputes Act of 1978 (CDA) , 41 U.S.C. sec. 607, directs that Boards of Contract Appeals "shall provide to the maximum extent practicable, informal, expeditious, and inexpensive resolution of disputes." The legislative history of the CDA reflects that the Act's provisions are intended "to help induce resolution of more contract disputes by negotiation prior to litigation." If a dispute cannot be resolved amicably, the CDA requires the contracting officer to issue a written decision explaining the reasons for denial of the claim.

In furtherance of the CDA's objective of providing a practical, informal and expeditious method of resolving disputes, Boards of Contract Appeals routinely attach to the notice of docketing for each appeal a "Notice Regarding Alternative Disputes Resolution Methods", which encourages the parties to explore the use of ADR, provides for removal of the case from the active docket if the parties jointly request it, and offers to provide a board member to act as a mediator or settlement judge to resolve the dispute.

7.8. Discuss some nearby professional initiatives regarding ADR

In an attempt to create a broader acceptance of ADR, some states have established disciplinary rules that create a responsibility to tell clients about alternatives to litigation.

• The New Jersey Rules of General Application, Rule 1:40-1, require lawyers to become familiar with available complementary dispute resolution programs (CDRs) and to inform their clients of them.

• The Colorado Rules of Professional Conduct, Rule 2.1, require that in a matter involving litigation, an attorney advise a client of available alternative dispute resolution possibilities.

• In Kansas, lawyers are required to discuss alternative dispute resolution methods with clients when ADR is proposed by Court or opposing counsel or when a lawyer's professional judgment indicates ADR is a viable option.

• On January of 1995, Sens. Mitch McConnell (R-Ky) and Spencer Abraham (R-Mich) introduced S300. Under this legislation, attorneys in federal cases would be required to advise each client of the availability of alternative dispute resolution options, including extrajudicial proceedings such as minitrials, third party mediation, court supervised arbitration, and summary jury trial proceedings. The bill requires that a complaint or responsive pleading would have to include a certification that the attorney has provided such advice to the client before filing. The legislation currently is before the Senate Judiciary Committee.

7.9. Report statistics

• Private Sector

In the private sector, there is a growing trend towards using ADR to resolve disputes. A survey conducted in 1993 by a litigation services group of a major accounting firm concluded that ADR techniques (particularly mediation) are effective and highly satisfactory. The survey notes that the significant savings in time and money were the primary reasons for using ADR, although the preservation of the working relationship through early settlement was also cited. More than 95 % of the frequent users planned to increase their use of ADR in the future.

The results of the sixth annual Corporate Legal Times/Arthur Andersen LLP General Counsel Survey (1995) reflects the same trend within the corporate legal community. Almost half (49.5%) of the general counsel surveyed reported that they used ADR in 1994. Of those who had, 75.9% said they increased their use from the previous year, indicating that ADR is gaining acceptance in some companies for some matters. 65.8% of the companies that used ADR used it five or fewer times in 1994, far outweighing the 22.5% of heavy users – those who had turned to ADR more than 10 times.[46]

Data collected by firms such as the American Arbitration Association, Center for Public Resources, Judicial Arbitration and Mediation Services, and Endispute further confirm that ADR works. For private sector cases handled in 1991, providers of dispute resolution services indicated settlement rates of between 75 % and 90 %.[47]

• Governmental Activities

Like the private sector, Government activities have benefited economically from using ADR. The Resolution Trust Corporation estimated that it has saved over $115 million in legal fees and expenses in four years by using ADR to resolve disputes among controlled institutions, creditor claims and lawsuits against major corporations. The Army Corps of Engineers has seen a substantial decline in contract claims and appeals (1,079 in 1988 to 314 in 1994, and from 742 in 1991 to 365 in 1994, respectively.) The United States Mint reported that it has settled about 220 formal and informal EEO cases and grievances through ADR techniques and estimates savings of $3 million.[48]

8. Key cases for ADR in the U.S.

We shall discuss now some of the key cases which have come through the Board process – but not yet to the Board itself for adjudication. In *Bentley's Luggage*

[46] Statistics obtained from Corporate Legal Times – July 1995.

[47] Statistics obtained from an article published in NCMA's Contract Management, February 1994, titled "Alternate Dispute Resolution Procedures – How To Do More For Less Cost".

[48] Statistics obtained from the Report of the Chairman of the Administrative Conference of the United States on Agency Implementation of the Administrative Dispute Resolution Act, February 1995.

Corporation,[49] the employer operated a chain of nonunion luggage stores nationwide. The charging party, Letwin, employed as a "regular part-time sales employee," was required to sign an arbitration agreement which provided that in order to remain an employee of the company, any legal action regarding employment, or termination of employment, had to be submitted to "binding arbitration before a neutral third party" under the procedures of the American Arbitration Association. Under such procedures each party would bear its own costs and attorneys' fees and the arbitrator's fees would be "divided equally between the parties." At the same time, the company "emphasized," and the employee was required to acknowledge, that employment was "at will." The agreement stated that if: . . . a court decides that this policy [i.e. submitting disputes to arbitration] . . . is not enforceable for some claims, the employee and the Company agree that claims which are legally subject to this policy should be dismissed by the court. The charging party (namely Letwin) was terminated because of his refusal to sign the agreement. Other employees stated that they had signed the agreement because they could not afford to refuse to sign the agreement and thus lose their jobs. Unfair labor practice charges alleging violations of Section 8(a)(1) and (4) were filed with the Board alleging that Mr. Letwin's termination, because he refused to sign the agreement, violated the Act.

In Bentley's Luggage, the General Counsel issued a complaint on both Section 8(a)(1) and (4). The General Counsel cited the Supreme Court's National Licorice decision,[50] which held that the negotiation of individual contracts of employment, in the circumstances of union majority status, through which employees relinquish the right to strike and the right to demand a union security clause or a written contract with any union, was violative of the statute in the sense that it discouraged, if not forbade, the presentation of grievances. The General Counsel noted that this approach had been applied to a requirement that an employee waive his/her statutory right to file charges with the Board or invoke his/her contractual grievance arbitration procedure.[51]

The employer's basic argument was that the agreement was lawful under Gilmer. But the General Counsel rejected that decision's applicability to this case. The General Counsel's position was that Congress had evidenced an intent to preclude waiver of access to a public tribunal through the broad language of Section 10(a), which gives the Board authority to remedy unfair labor practices regardless of any other disputes resolution mechanism.

Second, the General Counsel distinguished Gilmer, noting that in that case the employee had signed the arbitration agreement and in Bentley's Luggage the employee was dismissed because he refused to sign. The General Counsel also noted that, while the EEOC (Equal Employment Opportunity Council) could investigate the age discrimination questions arising in Gilmer without the filing of a charge under Title VII, the Board is dependent upon private parties to file charges before its jurisdiction is invoked. Thus, said the General Counsel: . . . any attempt by an employer to bar an employee from filing an unfair labor practice charge would foreclose the Board from exercising its statutory jurisdiction.

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[49] Case 12-CA-16658.

[50] National Licorice Co. v. NLRB, 309 U.S. 350 (1940).

[51] The General Counsel cited Kolman/Athey Division of Athey Products Corporation, 303 NLRB 92 (1991); Kinder-Care Learning Centers, 299 NLRB 1171 (1990); Great Lakes Chemical Corp., 298 NLRB 615, 622 (1990); Retlaw Broadcasting Co., 310 NLRB 984 (1993).

The General Counsel also noted that since the employees were regarded under the arbitration agreement as at will employees, and no just cause was required to terminate the employee, there would be no actual basis through which one could challenge one's dismissal. Finally, the General Counsel distinguished Bentley's Luggage from Gilmer because of the Court's stress in Gilmer on the employees' education, experience and general sophistication.[52]

Another case, *Bingham Toyota*,[53] in which the General Counsel proceeded to file a complaint, emerged in 1994 as well. The complaint alleged that the discharge of employee *Rush* during a union organizing campaign was on account of union membership and, thus, in violation of Section 8(a)(3). *Rush* had signed a document that provided that he acknowledge receipt of the employer's Policies and Procedures Manual and that he agreed to such procedures and that: I agree [that] my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or myself . . . Any disputes regarding . . . any termination [of employment] . . . shall be submitted to binding arbitration . . . . The arbitration shall be final and binding . . . .

Like the provisions in Bentley's Luggage, each party was required to compensate their attorneys and to share the costs of arbitration as well as, in this case, the hearing room and the transcript, unless the arbitrator ordered otherwise. The General Counsel took the position that the use of this contract would frustrate access to the Board. And again, the General Counsel noted that the employee involved in Gilmer was sophisticated and an experienced businessman and that here the employee, a parts technician, could not have been as sophisticated about his legal rights. Said the General Counsel: "The contract is also voidable on the grounds that it is one of indefinite duration."[54]

In a third case, *Great Western Bank*,[55] it was alleged that the charging party executed an arbitration agreement "in consideration of my employment" which required both current and former employees to use the company's arbitration procedure in lieu of any civil legal proceedings or administrative proceedings or lawsuits, and required the employee to acknowledge that she was "waiving any right that I may have to resolve employment disputes through trial by jury." The employee had the right under the agreement to hire an attorney but was required to pay the fees of any witnesses, stenographic record, and to pay any arbitration award with a cap of $250. The arbitrator's authority was to fashion relief which was "just and equitable" and not to grant an award for punitive or exemplary damages or double or treble damages.[56]

In *Raytheon, E-Systems Greenville Division*,[57] the employer was alleged to have a policy requiring employees to submit any and all employment disputes to arbitration to waive all rights to initiate other legal proceedings. Under this policy, the employer allegedly dismissed or refused to hire workers who would not sign the agreement.[58]

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[52] William B. *Gould* IV, ibid.
[53] Case 31-CA-13604.
[54] William B. Gould IV, ibid.
[55] Case 12-CA-16886.
[56] William B. Gould IV, ibid.
[57] Case 16-CA-17970.
[58] William B. Gould IV, ibid.

As we can see, the cases have begun to appear at the Agency – though none yet at the Board for adjudication. Meanwhile, the development of alternative dispute resolution systems, particularly in the nonunion sector, has generated a number of responses. On February 3 of 1997, the American Bar Association approved the so-called due process protocol for mediation and arbitration statutory disputes arising out the employment relationship.[59] The protocol, however, did not achieve consensus on the question of whether an agreement requiring final and binding arbitration, which is formulated in advance of the dispute in question, is appropriate. Nor did it resolve differences on the question of whether an employer can insist upon such an agreement as a condition of employment, rather than providing that it be both informed and voluntary. Nor did it address the question of the right of employers to obtain waivers from employees of statutory claims or access to some public tribunal.

The protocol, however, did focus upon so-called *standards of exemplary due process*. It provided that employees have the right to be represented by ". . . a spokesman of their own choosing" and that the procedure should reference institutions which might provide assistance to employees.

On the question of *fees for representation* it stated that the issue should be determined between the claimant and the representative. Stated the protocol: We recommend . . . a number of existing systems which provide employer reimbursement of at least a portion of the employees attorney fees, especially for lower paid employees. The arbitrator should have the authority to provide for fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law on the interest of justice.

The protocol also attempts both to *establish standards for roster membership* for such cases and explicitly advises mediators and arbitrators that they ". . . should reject cases if they believe the procedure lacks requisite due process." It purports to oblige institutions to train individuals to hear such cases and that agencies such as the American Arbitration Association may submit names of qualified arbitrators to the "parties."

Finally, on the issue of the *scope of review*, the protocol states that the arbitrator's award should be ". . . final and binding and the scope of review should be limited."

Meanwhile, the development of such procedures has began to attract attention in the U.S. Congress. Thus, Representative Anna Eshoo has introduced legislation for herself as well as Congresswoman Nancy Pelosi of the 8th District and such others 19 as Congressman Ronald Dellums of Oakland and Representatives Edward Markey and Jesse Jackson, Jr., – the legislation has been triggered by concern about sexual harassment in the securities industry. H.R. 983, introduced on March 6 of 1997, amends the civil rights statutes – not the National Labor Relations Act – to: . . . prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination based on race, color, religion, sex, national origin, age, or disability; and for other purposes.

The legislation and much of the litigation which has preceded have focused upon a number of issues which are intend to come before both the Board and the Court in the future. Insofar as the Board itself is concerned, the issues are likely to come before the Board in one of *two ways*. a) In the *first place*, they will emerge as the result

[59] The Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, dated May 9,1995.

of mandatory systems which requires as a condition of employment that employees both accept arbitration and lose or possess a substantially diminished access to the Board and the Act. b) The *second way* in which they can come before the Board involves the question of deference by the Board to arbitration, i.e., deference both prior to resort to arbitration and subsequent to the arbitration award itself. The question of Board review of arbitration awards is something that has confronted the Board under collective bargaining agreements for more than forty years and it is an issue in the present as well.[60] But what is involved here is whether the principles that have emerged in both pre-arbitration deferral, as reflected in the so-called Collyer[61] line of authority, is whether the same principles that have emerged here have any applicability to the nonunion sector.

The California State Bar Committee on Wrongful Discharge issued a report advocating comprehensive legislation which would mandate arbitrations. It suggested – though there were admitted constitutional issues involving preemption which we addressed – that the existence of mandated arbitration at the state level could, with good effect, apply to disputes involving union organizational campaigns covered by the National Labor Relations Act where the union or individual employees filed charges alleging discrimination on account of Section 8(a)(3). In the present context, of course, arbitration of such disputes would complicated by the fact that it would require consent by both sides, and I am not sure that consent would be provided by employers in a substantial number of theses cases, and perhaps not by unions themselves.

Jay Siegel, has pointed out[62] the savings to the Agency and the parties in terms of litigation and various levels of appeals, both before the Board and the courts, would be enormous. The incentive for the employer would be that, by virtue of prompt resolution of the matter, backpay and liability would be limited. From the perspective of unions, they would be able to get an expeditious determination which might thus diminish a "chilling" of their campaign.[63]

[60] See, e.g., Olin Corp., 268 NLRB 573 (1984) and Spielberg Mfg. Co., 112 NLRB 1080 (1955). In Mobil Oil Exploration & Producing, U.S., Inc., Case 15-CA-12801, we have the opportunity to consider this issue anew.

[61] Collyer Insulated Wire, 192 NLRB 837 (1971).

[62] Jay *Siegel*, Changing Public Policy: Private Arbitration to Resolve Statutory Employment Disputes, (1996 unpublished).

[63] William B. *Gould* IV, ibid.

PART THREE
The Alternative Dispute Resolution System in Australia

1. Introduction

It is the intent of the procedures, in Australia as well, that the grievance be settled as early as possible in the process without the necessity for involvement of the Industrial Relations Commission. However, it is acknowledged that this may be unavoidable on occasions.[64]

The objective of the Human Resource Framework is to promote and foster good employee-employer relationships in the workplace, where the emphasis is on the avoidance and resolution of disputes by cooperation, consultation, negotiation and information sharing.

The effective management of industrial relations should be part of an overall framework of internal consultation and negotiation which also includes industrial democracy plans, systems for communicating with people and a participative management style. It contributes to performance and morale, and thus the achievement of corporate goals, through the cooperative maintenance of working conditions, including a safe and healthy work environment. A harmonious workplace and the minimization of disputes is also likely to contribute to the attraction and retention of people, thus facilitating human resource planning. The effective resolution of workplace issues through effectively managed industrial relations may also minimize resort to the formal grievance process.

The effective management of industrial relations contributes to efficiency and effectiveness. The cooperative and participative resolution of disputes is founded on the principle of industrial democracy.

2. What Australian Lawyers Know (and don't know) About ADR: The Dispute Resolution Survey

In 1992 the American Bar Association published the results of an extensive investigation into the professional education of lawyers, the core of which was a statement of "Fundamental Lawyering Skills".[65] One of the ten enumerated skills was described as follows:

"In order to employ – or to advise a client about – the options of litigation and alternative dispute resolution, a lawyer should understand the potential functions and consequences of these processes and should have a working knowledge of the fundamentals of: ... proceedings in other dispute resolution forums."

Recently it has been reported in Internet discussions that enrollment in alternative dispute resolution courses in American law schools has been exploding – perhaps as a result of the prominence given to such study by that nation's leading professional body. In addition, organizations such as the Institute for Dispute Resolution at California's Pepperdine University have established international

[64] HR Web Crew, Equal Employment Opportunity Office, 1997.

[65] See "Legal Education and Professional Development – An Educational Continuum", American Bar Association, Chicago, July, 1992.

reputations for training practicing lawyers and other professionals in dispute resolution techniques.

However, in Australia, perhaps the legal culture has not been so receptive to extra-judicial dispute resolution. For example, the Chief Justice of the High Court, in 1990, worried over the threat to the rule of law which he saw in turning away from dispute resolution by the courts:

"Alternative dispute resolution may have some part to play, but, if that were to become the chief means of deciding business disputes, we would in time develop a legal sub-culture – at odds with existing legal principle – and we would have weakened the existing courts by increasing the difficulty of recruiting and retaining judges of high quality."[66]

3. Principles of Natural Justice

When involved in any grievance situation it is important that the principles of natural justice are applied. These principles involve ensuring that all parties affected by a grievance be granted a fair hearing prior to any resolution being attempted. Essentially this means that:

– complaints must be fully described by the person with the grievance;

– the person(s) should be furnished with details of any allegation(s) against them (gathering such details may involve a lengthy investigation first);

– the person(s) against whom the grievance/complaint is made should have the opportunity and be given a reasonable time to put their side of the story before resolution is attempted;

– proceedings should be conducted honestly, fairly and without bias; and

– proceedings should not be unduly delayed.

Under these grievance procedures, staff have the option of initially seeking a resolution to their grievance formally or informally. It is the intent of the procedures that grievances be settled as early as possible in the process. If attempting an informal resolution initially, staff should discuss the matter fully with their supervisor (or in the case of a grievance against a supervisor, with their supervisor's supervisor), who will then respond verbally (having consulted with appropriate parties involved in the matter).

If staff wish to make a formal grievance, either initially or following an unsuccessful attempt at informal resolution of the matter, the person with the grievance must provide details of the grievance in writing to their supervisor, supervisor's supervisor or Human Resources.[67]

4. Grievance Procedures

Subject to the provisions of the Australian Industrial Relations Act 1988 (as amended), any grievance, complaint or dispute, or any matter raised by the parties to this Agreement shall be settled in accordance with the procedures set out herein. In

[66] Hon Sir Gerard *Brennan*, "Professional Orientation: Business or Law?" Australian Law News, July, 1990.

[67] HR Web Crew, Equal Employment Opportunity Office, 1997.

matters concerning equal employment opportunity and/or sexual harassment, the specific procedures as outlined in Affirmative Action Policy and the Sexual Harassment Policy should be referred to in conjunction with these procedures.

While these dispute settling procedures are taking place, existing working arrangements shall continue [unless an alternative arrangement is mutually agreed]. In order to allow for the peaceful resolution of grievances the parties shall be committed to avoid stoppages of work, lock-outs or any other bans or limitations on the performance while the procedures of negotiation and conciliation are being followed. It is recognized that all parties concerned are entitled to fair treatment in relation to the procedures.

Where the matter is raised by an employee or group of employees, or a union representative the following steps shall be observed:

1. In the first instance, the employee(s) concerned shall either discuss the matter with their immediate supervisor or notify that person in writing of the matter, except where a staff member claims to have been aggrieved by the immediate supervisor, in which case the supervisor's immediate superior should be informed.

The supervisor shall, if able, make a full verbal response (or in the case of a matter notified in writing, a full written response) to the staff member no later than five working days from the date that matter is raised.

2. If the matter cannot be resolved at this level the supervisor shall refer the matter to the Director, Human Resources and shall advise the aggrieved staff member(s) accordingly.

The Director, Human Resources (or nominee), upon being so advised, shall arrange a meeting within five working days between the head of the relevant area/department/ school/center, the aggrieved staff member(s) and person(s) directly subject to the dispute. Prior to the meeting, the aggrieved staff member(s) shall be advised of the parties attending and of their right to have a representative at the meeting.

Provided that, subject to agreement between the employee(s) and the supervisor concerned, the matter may be referred to the designated consultative committee for resolution.

3. If agreement has not been reached within two working days following the meeting referred to in subclause above, or if a timely meeting was not convened, the staff member(s) shall advise the Director, Human Resources in writing of the continuing unresolved dispute. Upon such notice, the Director, Human Resources (or nominee) shall establish a dispute resolution committee comprising: a) one senior Company officer (capable of speaking for the Company within the constraints of Company policy on such matters as are raised by the dispute); b) one nominee of the relevant union or a staff representative, as appropriate; and

c) a Human Resources representative.

The dispute resolution committee meeting shall be held within ten working days of the written notice of the continuing unresolved dispute to the Director, Human Resources. The parties at this meeting shall make all reasonable attempts to resolve the matter and shall have access to relevant information, records and persons.

Within five working days of their meeting, the dispute resolution committee shall advise the Director, Human Resources in writing of the outcome of their meeting/deliberations/discussions. If the outcome is an agreement, the agreement shall be outlined in the report signed by all the parties.

4. Should the matter remain in dispute after the above processes have been exhausted a party may refer the matter to the Australian Industrial Relations Commission (AIRC). Recommendations made by the Commission shall be binding on the parties and shall constitute a settlement on the matter.

5. The Company may seek the assistance of the relevant higher body of national employer association, and the Union may seek the assistance of the ACTU in accordance with existing AIRC recommendations in the industry.

6. Confidentiality. When dealing with a grievance, complaint or dispute, or any other matter raised under the provisions of this clause, the people involved must adhere to confidentiality guidelines.

Where a complaint is made under this process which deals with the reputation of other people, the common law defence of Qualified Privilege should protect the complainant from a suit of defamation as long as he/she has given the information, in good faith, to a person within the Company who has a duty to receive it, such as the Director, Human Resources (or nominee), a manager, or a supervisor.

7. The provisions of this clause shall not preclude an employee from discussing any grievance with a Union representative as he or she deems fit. Neither shall the provisions of this clause pre-empt, limit, or delay the right of the Union to enter into direct negotiations with the Company to resolve matters in dispute or to address matters of mutual concern.

8. Nothing in this procedure shall preclude the parties reaching agreement to shorten or extend the periods referred to in this clause, or to begin the dispute process from the stage in subclause (3) above.

9. Matters raised within this process may be withdrawn by the staff member (or the Union) by notice in writing to the Director, Human Resources.

10. Offers of compromise, as well as agreements reached during this dispute resolution procedure shall not constitute precedents in regard to other, similar disputes and are without prejudice to positions which the staff member, a Union, or the Company might take in regard either to similar circumstances or to more general issues.[68]

5. A Human Resource Framework for the Australian Public Service

The Australian Public Service (hereinafter: APS) is subject to the same industrial processes as the broader community under the provisions of the Industrial Relations Act 1988. In the APS, bans and limitations imposed in the workplace can be addressed through formal and informal processes.

5.1. Managing industrial relations in practice

The effective management of industrial relations requires a culture which emphasizes consultation and communication. The APS Agreement, agency agreements and most APS awards include dispute avoidance and settlement procedures which aim to avoid or resolve industrial disputation through prompt and constructive workplace

[68] HR Web Crew, Equal Employment Opportunity Office, 1997

negotiation, beginning at the lowest possible level. While a problem is being dealt with by means of a dispute avoidance or settlement procedure, it is expected that work practices should continue as normal (unless there is a genuine safety issue involved). This means that management should not proceed with the implementation of any of the changes which are under contention and, equally, the union should not impose any industrial action while the steps are being followed.

Under the provisions of the Australian Public Service Act 1922, agencies are required to consult with unions over a range of internal matters. The process of consultation provides the opportunity to deal with matters affecting management and people on a cooperative basis, thus reducing the potential for industrial action. If industrial action is pursued, informal processes normally include discussions with unions on a "without prejudice" basis in an attempt to cease the industrial action without resorting to the more formal processes.

Managers also need to consider whether disputation or potential disputation have only local significance or whether they have broader implications for the department or the APS. Issues which may have APS-wide implications will require consultation with the Department of Industrial Relations (DIR) and/or the PSMPC as appropriate.

In the case of unresolved disputes involving industrial bans, limitations and/or stop work, the appropriate course of action may be to seek timely assistance from the Australian Industrial Relations Commission to resolve the issues.

5.2. Responsible agencies

The Department of Industrial Relations, in consultation with the two other central agencies – the PSMPC and the Department of Finance – has overall responsibility for the management of APS industrial relations. On Service-wide matters DIR represents the Government as the employer in negotiations and represents the Minister for Industrial Relations, (who is the 'employing authority' for APS staff under the provisions of the Industrial Relations Act 1988), in the Australian Industrial Relations Commission.

Through devolution and under the framework of workplace bargaining, agencies are taking greater responsibility for the management of their industrial relations, including developing and negotiating agency agreements, compliance with certified agreements, relevant awards, determinations and policies, and managing industrial disputes.

5.3. Related elements

The success of managing industrial relations greatly depends on the elements of communicating with people, participative management, and consultative arrangements.

An agency's ability to establish and foster a good relationship between management and employees based on trust and respect is crucial. Good management is knowledge and proper application of the provisions of awards, determinations and the

Public Service Act 1922, and an awareness that any management action has the potential for affecting the employer-employee relationship.[69]

[69] Source: http://www.psmpc.gov.au/publications/frameworkpt2industrial.htm

PART FOUR
The Proposed Alternative Dispute Resolution System in South Africa

1. Introduction

During the last few years many governmental and non-governmental organizations have been striving at different levels to provide affordable and appropriate dispute resolution institutions and procedures in different communities of society. This has been done in order to promote more effective access to justice for all the people of South Africa. Organizations such as the *Community Dispute Resolution Trust*, the *Community Peace Foundation*, the *Assessors Coordinating Committee*, the *Association of Arbitrators*, the *Arbitration Foundation of South Africa*, IMSSA and others all come to mind.

The South African Law Commission has been engaged in an investigation into arbitration since 1995. As a first step it published a draft International Arbitration Act for information and comment in December 1996. It also intends to undertake a revision of the Arbitration Act 42 of 1965. This will be done by asking interested parties by means of an appropriate Working Paper to submit comments on the 1965 Act.

On 8 July 1996 the Minister requested the Law Commission to broaden its investigation into arbitration to include all facets of alternative dispute resolution (ADR) in order to provide a framework within which ADR could be discussed in an orderly fashion. The Minister stressed the urgency of the project, as formalized methods of ADR could relieve the overburdened court system. The Commission considered and approved the inclusion of such an investigation in its program and a project committee for this purpose was duly appointed by the Minister of Justice with effect from 16 September 1996. Work commenced on 26 October 1996.[70]

2. Basic issues

2.1. Why ADR

There is a wide perception that the formal system of justice in the country before the commencement of the present constitutional dispensation suffered from the effective exclusion of most South Africans from the forming and execution of legislation.[71] For many, a foreign, dominant, Western legal system, was seen to be superimposed on an intuitive, indigenous legal system.[72] The law was largely perceived by blacks to be an instrument of oppression.

The inability to meet the needs of the ordinary citizens was however not merely due to the content of the substantive law, but also because the structure and procedural

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[70] Alternative Dispute Resolution, South African Law Commission, Issue Paper 8, Project 94, 15 July 1997

[71] *Carpenter*, G. " Public opinion, the judiciary and legitimacy" (1996) 11 SAPL 110.

[72] Van *Niekerk*, G. J. "People's courts and people's justice in South Africa – new developments in community dispute resolution" (1994) 1 De Jure 19 (hereinafter referred to as Van Niekerk).

requirements of the courts meant that many people were denied access to the courts.[73] Many of the peculiar problems facing the black community stemmed from the largely ineffective administration of the justice system in black areas. The legal problems as well as problems of social adjustment encountered by urban blacks were not being solved. It is therefore not strange that people resorted to self-help in the form of unofficial or folk institutions. In urban areas different forms of community courts were instituted.

These courts had their philosophical background in the customary law that was being practiced by traditional leaders in traditional courts in the rural areas. It could however also be seen as a particular application of the consensual principles of ADR and its non-authoritarian consensus-producing processes within the structure of a specific community and according to the culture of its prevailing moral norms and social standards.[74]

The new Constitution of South Africa,[75] with its Bill of Rights, is based on the principle that all people are equal before the law. The problem is that the equality thus achieved will be more of a facade than a reality if people are still de facto excluded because, due to past injustices, they do not have the economic, social or cultural ability to make use of those rights or to participate meaningfully in the administration of justice. What is therefore necessary is an attempt to add a "social" dimension to the Rechtstaat in terms of which even the disadvantaged and poor will be entitled to representation and information. In this setting consideration may be given to alternative remedies and processes which may make justice fair and more accessible. Community courts may therefore still have an important role to play even in the new dispensation.

It is however also true that, quite apart from the problems experienced by those previously disenfranchised, or otherwise powerless, the justice system in South Africa is under constant scrutiny and criticism from various interest groups (business, labor, religious groups, cultural groups or community groups) continually looking for more speedy, more effective, less cumbersome, less expensive and often less conflicting ways of resolving disputes and problems. This is the case in most advanced countries even those with very sophisticated judicial systems.[76]

The most common general complaint about the current justice system in South Africa is that the cost of litigation is prohibitive. This prevents meaningful access to courts and even those with access are often victims of delay. For most litigants, delay means added expense and for many people justice delayed is justice denied. Delay combined with the cost of litigation has put justice beyond the reach of the ordinary citizen. The incomprehensibility and adversarial nature of the process with a resulting lack of control (parties can only participate in an indirect manner) furthermore leads to a sense of frustration and disempowerment. Courts offering only trials are furthermore limited in their response to a legal dispute. Litigation often creates winners and losers and even winners may feel like losers given the limited nature of many legal remedies imposed from a limited range of win or lose options.

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[73] *Grant*, B & *Schwikkard*, P "People's Courts?" (1991) 7 SAJHR 304.

[74] *Faris*, J "ADR, community dispute resolution and the court system" Community Mediation Update CDRT Newsletter No 10 April 1996, 7.

[75] Constitution of the Republic of South Africa, Act 108 of 1996.

[76] *Omar*, AM "AFSA: The need for alternative dispute resolution" Address delivered at the opening of Arbitration House as extracted in 1996 9 Consultus 126.

In this regard it is to be noted that modern developed Western societies have in the last twenty years or so come to appreciate the necessity for access to justice through alternative dispute resolution techniques based on what can be called "co-existential justice".[77] This form of justice has however always been part of African and Asian traditions where conciliatory solutions were seen to be to the advantage of all and often as a sine qua non for survival.

Effective government is largely dependent on a respected legal system. The challenge facing the democratic state is to ensure that the justice system is acceptable and accessible to the larger community.

The Justice Ministry has already started transforming the justice system at various levels in line with democratic values. It may be that the introduction of ADR-techniques supplementing formal justice systems at different levels may help to provide South Africans with an opportunity to establish an acceptable justice system that will be swift and effective.

2.2. ADR today

Traditional forms of dispute resolution which, for present purposes, may be termed ADR processes, have long existed in rural South Africa. Unofficial dispute resolution has furthermore been the norm in metropolitan areas for as long as these areas have existed. The earliest unofficial people's courts were the civic associations with dispute-settlement functions which were found in 1901 in the township of Uitvlugt in the Cape Town area.[78]

In the latter part of the 1970's the people's courts were generally known as *makgotla* and should be distinguished from the politicized people's courts that could be found in the mid-1980's. In 1989 new structured people's courts emerged. They are today successfully functioning as community courts.[79]

Many different institutions, governmental and non-governmental, have over the years tried to address the question of integrating, controlling , acknowledging or formalizing these institutions. The State's efforts to control these alternative institutions through the establishment of advisory boards, urban and community councils and town councils proved unsuccessful. More recently, attempts have however been made by a number of NGO's to introduce more appropriate forms of dispute resolution to communities. Examples of such initiatives are those being conducted by the Community Dispute Resolution Trust (CDRT) and the Community Peace Foundation. These initiatives have met with mixed degrees of success.

Commercial arbitration has long been part of the dispute resolution framework in South Africa and in other Western countries. It is well established in South Africa. The Alternative Dispute Resolution Association of South Africa (ADRASA) and more recently the Arbitration Federation of South Africa (AFSA) have been significant attempts to institutionalize private commercial arbitration and, to a much lesser extent, mediation. Similar initiatives exist in the field of engineering and construction.

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[77] *Cappelletti*, M "Alternative dispute resolution processes within the framework of the world-wide access-to-justice movement" (1993) 56 The Modern Law Review 287.

[78] Van *Niekerk* 22.

[79] Ibid.

In the 1970's the major shift that took place in industrial relations gave rise to a need for more appropriate forms of dispute resolution in the workplace. This need was filled at the time by the Independent Mediation Service of South Africa (IMSSA) which was instrumental in introducing forms of mediation and arbitration. The success of this initiative has been borne out by the extensive reliance on mediation and arbitration in the new Labor Relations Act and by the establishment of the CCMA to carry out these functions.

The introduction of alternative dispute resolution methods into the field of family disputes (divorce) has also been significant. Respondents are specifically invited to consider the successes and failures of these and similar endeavours.

2.3. Goals of ADR

The goals of ADR may be described as follows:

a) to relieve court congestion, as well as prevent undue cost and delay;

b) to enhance community involvement in the dispute resolution process;

c) to facilitate access to justice; and

d) to provide more effective dispute resolution.

ADR experts in the United States (where the practice of ADR is well advanced) have expressed some doubt as to whether the practice of ADR can ever relieve court congestion. Nor is there any evidence to show that this has been the case in South Africa. Undoubtedly, however, there are methods of resolving disputes which are less expensive and more expeditious than formal litigation. This is being borne out in the labor field where research has shown that dismissal disputes were generally dealt with on a less costly and more expeditious basis by arbitration than they were in the Industrial Court.

A second goal of ADR, namely to enhance community involvement in the dispute resolution process, is of particular importance in South Africa. South Africa's recent history has served amongst other things to alienate a significant section of the population from the formal court system. The development of appropriate forms of dispute resolution which encourage and enhance community involvement and bear the stamp of legitimacy is therefore of cardinal importance to those who would see disputes and conflict effectively resolved.

The third goal of ADR, namely to facilitate access to justice, is perhaps ambitious. For example, parties, who with the assistance of a mediator, are able to resolve their dispute may not regard themselves as having received justice but may simply consider that they have attained the more modest goal of settling their dispute. Undoubtedly, dispute resolution in its broadest sense does, and will continue, to facilitate the increased resolution of dispute.

The most important goal of ADR is arguably the fourth goal stated above, namely to provide more effective dispute resolution. As already stated, it is of the essence of the study and practice of alternative dispute resolution to provide mechanisms and processes which will resolve disputes more effectively than an automatic recourse to litigation. Indeed, one of the most significant effects that dispute resolution practice has had in South Africa over the last decade is to challenge the view that adversarial litigation is the only means, apart from agreement, of resolving disputes.

2.4. Categories of dispute resolution

Three major categories of dispute resolution which may be considered are:

a) Dispute resolution processes involving private decision-making by the parties themselves. This category would include negotiation and mediation;

b) dispute resolution processes involving private adjudication by third parties. Arbitration would fall into this category; and

c) dispute resolution processes involving adjudication by a public authority. This category would include administrative decision-making and formal litigation before the courts.

2.5. State control vs. state support

It is essential to recognize a fundamental difference between adjudication at the hands of public authorities and ordinary forms of ADR. Arbitration, mediation and other forms of alternative dispute resolution rely for their effectiveness on the willingness of the parties to submit to the process. They do so by agreement. On the other hand, the compulsory jurisdiction conducted at the hands of the state relies for its effectiveness on the ability of one party to compel the other to submit to the jurisdiction of the state.

This distinction raises a fundamental issue whether or to what extent ADR processes should be introduced into the formal and compulsory jurisdiction of courts administered by the State.

The introduction of community courts utilizing ADR processes would be one such example. Another example which is at present in operation is the normalization of alternative forms of dispute resolution such as conciliation, mediation and arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration (the CCMA) in terms of the new Labor Relations Act.

Notwithstanding the public/private distinction referred to above, there are many instances of the introduction of ADR processes as adjuncts to the formal system, for example, victim-offender programs as adjunct to the criminal courts; conciliation and arbitration under the auspices of the CCMA as adjuncts to the labor dispute resolution system; the use of mediation in family disputes; more sophisticated pre-trial procedures in the formal court system and others.

An interesting development in the United States is the introduction under the auspices of the formal justice system of what are termed "multi-door court-houses". These are state institutions where parties are directed to the most appropriate form of dispute resolution for their particular dispute (whether it be mediation, arbitration or adjudication), all processes being available under a single roof.

Another way to approach the introduction of ADR processes into South African Communities would be to lend state support to private initiatives in the field.

2.6. ADR: a solution?

The question to be addressed is therefore whether the administration of justice will be enhanced if a broader concept of dispute resolution could be accommodated within the formal legal system. The Law Commission will endeavour, with the assistance of all role players, to facilitate this investigative process. In this effort ADR will have to be evaluated with a view to improving existing ADR initiatives. The further role of ADR with regard to access to justice, juvenile justice, family law, the simplification of the criminal and civil justice system as well as in the area of customary indigenous law will have to be investigated. It is important to find alternatives capable of better accommodating the urgent demands being expressed in a time in which societal transformations are taking place at an unprecedently accelerated pace.[80]

3. Identifying specific issues

3.1. Role for ADR in civil practice

The Commission needs to know from interested parties essentially three things. The first is whether they consider there to be a role for ADR in civil practice. The second is what precisely (if it is considered that there is such a role) it should be. The third and – perhaps the most important aspect in determining any practical course of action – how should this be achieved.

In offering views in this regard, respondents may care to give some consideration to the following:

3.1.1. Scope of ADR

ADR is defined in different ways. One definition covers all alternatives to litigation as a method for resolving disputes. That definition therefore includes arbitration. It is however more common to restrict ADR to non-adjudicative forms of dispute resolution, excluding both litigation and arbitration.

3.1.2. Conciliation and mediation

Although there is a lack of uniformity in the use of the terms mediation and conciliation[81] both refer to a consensual means of dispute resolution where an acceptable third party is called in to facilitate the negotiation of a settlement between the parties. Even if the third party is required to recommend a solution if negotiations

[80] Alternative Dispute Resolution, South African Law Commission, Issue Paper 8, Project 94, 15 July 1997

[81] *Butler*, D & *Finsen* E Arbitration in South Africa – law and practice Juta Cape Town 1993 10 (hereinafter referred to as Butler and Finsen).

fail to achieve a settlement, this solution only becomes binding on the parties with their consent.

Mediation is not without its disadvantages and problems.[82] However if successful it should offer a significantly quicker and less expensive means of resolving a dispute than either litigation or arbitration. The parties, with the assistance of the mediator, are also able to achieve a pragmatic solution based on the parties' interests, rather than one based on their legal rights.

The extent to which it is necessary or desirable to deal with mediation or conciliation in the context of international arbitration legislation is briefly considered in Discussion Paper 69 of the Law Commission.[83] No additions to the UNCITRAL Model Law were recommended for this purpose. Whereas some jurisdictions, e g Hong Kong have included one or two provisions in the arbitration legislation to deal with specific problems (court appointment of a conciliator where the parties cannot agree on a conciliator and a provision empowering a person to act as arbitrator although that person has previously acted as conciliator in the same dispute), some other jurisdictions have endeavoured to promote the use of conciliation by a more detailed statutory framework, influenced by the UNCITRAL Conciliation Rules of 1980.[84] These provisions only apply with the consent of the parties where they agree to resort to conciliation and are designed to facilitate successful conciliation.

3.1.3. Court-annexed forms of ADR

Another way of categorizing ADR techniques which is relevant to this investigation is to distinguish between those subsidiary to the judicial process and those which are alternatives to the judicial process.[85] Examples of "subsidiary" ADR in other jurisdictions are court-annexed mediators in Canada and court-appointed referees in Australia. In South Africa the Supreme Court Act provides for certain matters to be referred by the court with the consent of the parties to a referee. A recent example of this provision being used is LTA Construction Ltd. v Minister of Public Works and Land Affairs.[86] There is also the Short Process Courts and mediation in Certain Civil Cases Act 103 of 1991. To what extent can these existing procedures be better utilized and improved? To what extent should parties be compelled to use some form of court-annexed ADR? Lord Woolf[87] does not believe that ADR should be compulsory "either as an alternative or as a preliminary to litigation".

ADR is nevertheless closely linked to the reform of civil procedure and arbitration procedure. Settlement by mediation or conciliation will be more easily achieved if the parties are acutely aware that failure to settle will result in an imposed

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[82] *Butler & Finsen* 14; *Miller*, J "Alternative dispute resolution ('ADR) – common problems and misconceptions" 1996 62 Arbitration 186.

[83] South African Law Commission Arbitration: A draft international arbitration act for South Africa Discussion Paper 69 1996.

[84] See the Nigerian Arbitration Act of 1988 ss 37–42 and the Indian Arbitration and Conciliation Act 26 of 1996 ss 61 – 81).

[85] *Odams*, M " The influence of commerce on the changing face of dispute resolution" (1996) 62 Arbitration 277.

[86] 1992 1 SA 837 C.

[87] Right Honourable Lord Woolf Access to Justice Interim report to the Lord Chancellor on the civil justice system in England and Wales June 1995 136 (hereinafter referred to as Woolf report).

solution in the very near future.[88] Improved litigation and arbitration procedures will lead to more effective ADR, particularly mediation. It is also significant that the interest in ADR has been mainly in countries with a common-law adversarial system of civil procedure. As litigation in civil-law countries is quicker and less expensive there has been correspondingly less interest in ADR.[89]

3.1.4. Mini-trials and further forms of ADR

Other forms of ADR have been considered for South Africa.[90] What other forms of ADR are appropriate for resolving commercial and civil disputes in South Africa and what should be done to promote their use?

3.1.4.1. The use of experts

In recent years there has been increasing dissatisfaction amongst parties to commercial contracts and certain consumer agreements with the high cost and delay associated with resolving disputes by both litigation and arbitration, particularly if the arbitral procedure is dominated by traditionally- minded lawyers resulting in the arbitration turning into "privatized litigation". This has led to increasing use of dispute-resolution clauses in contracts providing for the resolution of any dispute arising out of that contract by an expert. Depending on the nature of the dispute, the expert will be a lawyer, accountant or person from another appropriate professional discipline who is required to resolve the dispute "as an expert and not as an arbitrator". The decision of the expert is declared to be final and binding on the parties.[91] For a recent local decision concerning such a clause see Chelsea West (Pty) Ltd. v Roodebloem Investments (Pty) Ltd.[92]

Although this procedure is usually quicker and cheaper than a formal arbitration and is usually subject to strict time limits, the procedure to be followed and the procedural fairness of the procedure and any hearing is largely depend on the provisions of the contract, which may leave the procedure largely in the discretion of the expert. It must be borne in mind that in a standard-form consumer contract (e.g. for the purchase of a sectional title unit) the purchaser will have no bargaining power to change the terms of the dispute- resolution clause. As the clause is not an arbitration agreement, it could also provide that each party should bear its own costs, irrespective of the outcome of the proceedings. Section 35(6) of the Arbitration Act 42 of 1965 prohibits such a provision in an arbitration agreement referring future disputes to arbitration. One justification for s 35(6) is to protect the weaker party (the consumer) against such a provision in a standard-form contract.

Because the expert is not an arbitrator, neither the powers of assistance nor the powers of supervision and interference conferred on the court by the Arbitration Act apply. The abuse of the court's powers in relation to arbitration by a party wishing to

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[88] Lord *Donaldson* "Alternative dispute resolution" (1992) 58 Arbitration 102.
[89] De Witt *Wijnen*, OLO "ADR, the civil law approach" (1995) 61 Arbitration 38.
[90] See eg *Butler & Finsen* 16–19 regarding the mini-trial.
[91] See generally *Bernstein & Wood* 13–16.
[92] 1994 1 SA 837 C.

delay the making and enforcement of an award are no doubt one of the reasons for the use of "expert" dispute-resolution clauses.

However, in the event of one party failing to comply with the expert's decision, the other would have to apply the court for an order requiring the party in default to comply with its contractual obligation. The court must have some powers of supervision. What are the extent of these powers: would a refusal to enforce be limited to cases of fraud and collusion or where compliance would be contrary to public policy? As the expert is making the decision on the basis of professional expertise and arguably not performing a quasi-judicial function, would a dissatisfied party be able to sue the expert for negligence? Where the expert's own investigation has been less thorough than the party was entitled to expect, the answer could well be in the affirmative.

What are the advantages and disadvantages of using an expert as opposed to an arbitrator? Are there adequate remedies to protect a party (particularly a consumer) against the abuse of this procedure? What is the extent of the court's powers and is there any need for statutory intervention?

3.1.4.2. Ombudsman

The value of an Ombudsman for dispute resolution was recognized in England by both the interim report of Lord Woolf[93] and the earlier report of Beldham LJ on ADR to the General Council of the Bar.[94] Lord Woolf regards the Ombudsman as part of ADR. An Ombudsman can either be appointed by statute to protect the public against administrative injustice and maladministration by a government agency or can be privately appointed and funded, particularly in service industries like insurance and banking. Ombudsmen have wide powers of investigation and their recommendations need not be limited to what is strictly permitted as a matter of law.[95] Their services are usually free to the consumer who does not need legal advice.

The consumer is not bound by the Ombudsman's recommendation and is not precluded from taking the matter to court or to arbitration. Because Ombudsmen are appointed for a specific industry or sector, they also develop considerable expertise in dealing with disputes in their field. Apart from the success achieved by Ombudsmen in dealing with individual complaints their annual reports serve to identify problem areas and to raise standards generally in respect of the industry for which they are appointed.[96] Regarding the use of the Ombudsman by the insurance industry in South Africa see T Cohen.[97]

What are the particular advantages of the Ombudsman compared to other forms of ADR, for example small claims arbitration or mediation? What other industries in the private sector in South Africa and what entities in the public sector could usefully consider appointing an Ombudsman?

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[93] *Woolf* report 139 paras 16–21.

[94] *Beldham* LJ (1992) 58 Arbitration 178.

[95] *Woolf* report para 10.

[96] *Jefferies*, R "Alternative dispute resolution and the Ombudsman" (1996) 62 Arbitration 67.

[97] *Cohen*, T " The insurance ombudsman – an alternative dispute resolution forum for the insurance industry" (1996) 8 SA Merc LJ 252.

3.1.4.3. Dispute avoidance procedures in long-term contracts

Particularly in big construction projects, involving work over a number of years and with large amounts at stake, increasing use is being made of an independent Dispute Resolution Adviser (DRA) or Dispute Resolution Board.[98]

The DRA is usually engaged in addition to the professional employed by the employer to administer the contractor's performance of the construction contract. The DRA monitors progress and meets at regular intervals with representatives of the employer, the professional administrator, and the contractor, taking note of problems as they arise. The main function of the DRA is to promote cooperation between the parties and either to assist them to avoid disputes or to resolve them before they can escalate. The DRA is particularly useful where the employer is a government agency employing an in-house professional to administer the contractor's work.

What is the potential for applying this technique in South Africa? To what extent could it ensure that public money used on large construction projects is well spent and that vast amounts of time and money are not wasted in protracted arbitrations or court cases?[99] In respect of what other types of contract could the technique be usefully employed?

3.1.4.4. Labor law

A particular field respondents may wish to consider is that of labor law. The Labor Relations Act, 1995 took effect on 11 November 1996. It provides for mediation and arbitration. Does it do so adequately – or must its Commission for Mediation and Arbitration be given time before the question can be answered? Does that mechanism lend itself to wider application for other types of civil or commercial disputes?

3.1.5. Comparative law

In the United Kingdom the Heilbron Committee's report argued in June 1993 that there were grave defects in the workings of the civil justice system in the United Kingdom. In 1994 the Lord Chancellor responded to the profession's initiative by appointing Lord Woolf to conduct a review of civil justice. This took place against the background of a general feeling of dissatisfaction with civil justice in that country, and in particular, with delays and costs.

In his interim report (Access to Justice) published in June last year, Lord Woolf sought to identify primarily what a civil justice system should achieve; what was

[98] *Luk*, JWK & *Wijedoru*, B " A proposal for a more effective and efficient resolution system for international construction contracts" (1993) 59 Arbitration 100; Butler DW "Dispute resolution procedures" in Loots PC (ed) Construction law and related issues Juta 1995 1009; Luk, JWK & Wong, WT "The current practice of dispute resolution adviser (DRA) in the construction industry of Hong Kong" (1995) 61 Arbitration 253 (hereinafter referred to as Luk & Wong).

[99] *Luk & Wong* 254.

wrong with the present system; what new approach to justice was required; and how this was to be achieved.

Commenting on these recommendations in the journal of the Bar of England and Wales,[100] Anthony Speaight warned that "the harsh truth is that the spiraling cost of civil litigation is a problem of intractable complexity". He continues: "Over the last decade there have been many reforms of civil procedure. Some of the country's finest brain power has shaped them. The theme of most of the innovations, such as written submissions and witness statements, has been greater use of paper procedures.

The aim of all these changes has been to reduce the cost of litigation. Yet it is universally accepted that over that period the cost of civil litigation has soared. The record of arbitration, which is the private sector competitor to the courts, has in general been equally disappointing. If the solution was at all easy to find, one might have expected that arbitrators would have had the market incentive to discover it. But every commercial practitioner knows that arbitration is generally even more expensive than litigation.

These very observations ought to prompt the question whether the direction of the last decade's reforms should be pressed any further. Indeed, the possibility should be squarely faced that today's crisis is the very consequence of well-intentioned reforms of recent years".

We quote this not as a reflection of any view yet formed by the Project Committee. It is not itself in any way dispositive of the questions posed above for responses. It represents however one (controversial) view in relation to the question of law reform which seeks to introduce ADR in the area of civil practice. The caution is not a new one. In Mr Justice Astbury's adage: "Reform! Reform! Aren't things bad enough already?

3.1.6. Methodology

The point to be made in the present context is that if respondents consider that there is a role for ADR in civil practice, it is essential for them to suggest in practical terms how that role is to be realized. In this regard, any implementation of ADR necessarily cannot take place in a vacuum. The point is well-illustrated by the proposed new rule 37A[101] (of the Supreme Court rules) which is under contemplation.

If respondents are of the view that there is a practical role for ADR in the civil justice system; and are able to delineate the manner in which it could be incorporated in current rules of court and civil practice, it would also be useful to know precisely how it is proposed that this be achieved. For example, what specific legislative

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[100] Counsel Nov/Dec 1994.

[101] The principle aim of the proposed new Rule is to reduce delays in bringing matters to trial. It comprises a system whereby parties and their representatives can agree to set their own timetable but will ,in the normal course, have to complete their preparations for trial within a prescribed time. It includes a procedure whereby a Default Hearing before a Judge will be called by the Registrar whenever a party fails to comply with the Court's directions. The Judge will endeavour to get the parties back on track. The matter may, however, be taken out of the main stream and placed on the 'Not Ready List' until preparations for trial have reached a satisfactory stage. The Rule also provides for the exchange of witness summaries and provisions aimed at limiting time consuming and unnecessarily expensive expert evidence. When the matter is ready for trial, the Registrar will allocate a trial date and convene a Final Conference where a Judge will ensure that the matter is ready for hearing and explore the possibility of a settlement of the whole matter or some of the issues.

amendments, or changes to the rules of court are contemplated? (It must be borne in mind in this regard that the Rules Board is aiming at achieving a single set of basic rules applicable to all courts, the essential variance in as few respects as possible). If it is suggested that ADR be incorporated as a particular phase of civil practice (in a compulsory way? how enforceable? in limited respects?) what is proposed as regards methodology?

3.2. Community courts

Community courts have become the contemporary term used when referring to popular justice structures such as street committees and yard, block or area committees operating outside the formal justice system in urbanized "African" townships and informal settlements. Mncadi and Citabatwa[102] refer to these justice systems as being informed by African traditional law, urban popular justice practices and religious law.

In contrast to the Roman Dutch legal system based on retributive justice, where the object is to establish blame and administer punishment, the informal courts identify responsibilities to meet needs and to promote healing and enforce values by using social pressure. Restorative justice and reintegrative shaming are two of the most important tools of the enforcement process. The judicial process, approach and reasoning used are all elements which echo indigenous South African procedures. It echoes the practice of makgotla, linkundla, ibunga and imbizo where the members of the community directly participate in questions and decisions. These popular justice systems have evolved to adapt their practices to urbanized circumstances.

Community courts should be distinguished from the people's or kangaroo courts which existed within a political context in the 1980's, when "mob justice" was meted out by people who did not represent structures which ordinarily would deal with justice issues in those communities, and which earned popular justice an unsavory reputation.

In most stable, organized communities there are at present street committees and civic structures that are functional. Indigenous township structures are more than merely courts. They are an integral part of the communalist world-view which inclines residents to compensate for the inadequacy and inappropriateness of state structures. This world-view is based on the principle of reciprocity. People obey because they know that they are going to need their peers at some future date. Family, tribe or village solidarity is often a sine qua non for survival. In addition to courts they are surrogate welfare, child care and support systems, burial societies and savings clubs, to name but a few functions. They thus form an integral part of organic township life throughout the country, be it Cape Town, Port Elizabeth, Soweto, Alexandra and stable areas in Kwa-Zulu Natal.

Community courts are a fact of life. A fundamental issue to be answered is whether, and if so, to what extent, the state should administer and regulate the courts, or lend its state support to private initiatives in the field. A hierarchy via a multi-tiered civic structure with a definite political alignment spell problems if participants do not share the same political allegiance. A solution may be for the state to create an avenue for the administration of justice within communities which will present the community

[102] *Mncadi & Citabatwa* "Exploring community justice" Imbizo Community Peace Foundation Issue 1 1996.

with opportunities thereby empowering it to participate in the shaping of its justice system.

With the implementation of the community courts the state may hope to reclaim their space in the area of justice, regulate all forms of justice systems in the country, work towards a unitary system that will dispense justice, extend the arm of justice in order to be more effective, bring justice closer to the people on a grassroots level and make the justice system more accessible and friendly.

Seen from the viewpoint of the communities, the objectives will be to get recognition for the organic structures and popular justice concepts which had evolved in the communities over the years, to work towards having uniformity in different sections of the communities, to participate effectively in dispensing justice with a restorative perspective, to address some of the unacceptable ways the Roman Dutch system is dealing with justice, to participate actively in the policy formulation on issues of justice, to rebuild the social fabric of society, to assist in transforming the formal structures by introducing indigenous models, to strengthen popular justice further by introducing alternative dispute resolution models and to assist the State in working towards cheap and effective justice system.

The advantages of a community court system seems to be that it depends on voluntary participation, it is cheap and accessible, language is used which is understood within the community, there is an absence of legalese, it creates the opportunity of relieving the criminal justice system of certain disputes, it is based on restorative justice with its holistic approach to problem-solving, it is sensitive to local community values and background conditions, there are fewer delays, therefore swift and less formal justice which helps in the knitting of the social fabric.

The disadvantages on the other hand seems to be that the courts are vulnerable to political pressure, the jurisdiction factor could be a problem, there is a lack of investigative capacity and representation: youth and gender inclusivity could be an issue particularly in a rural setting, it currently has parallel status with the formal system, it is not necessarily applicable in all communities in South Africa, and there is an inability to involve people if there is no voluntary participation.

A matter of major concern is that the community courts should not be regarded as poor people's justice for black people. In this regard it will be of paramount importance to ensure that minimum standards and guarantees should be maintained even in these alternative organs and procedures. The risk, of course, is that the alternative will indeed provide a second class justice. The courts should aim to uphold those safeguards of independence and training that are present in respect of ordinary judges and those formal guarantees of procedural fairness which are typical of ordinary litigation. It is however true that the present justice system cannot provide for issues of affordability, swiftness, repairing the damages caused by the offence and ensuring harmonious relations in communities (issues that are central to a restorative approach to justice) unless fundamental changes take place in the justice system. Far from being a cosmetic change, conciliatory justice may be able to produce these changes.

One of the characteristic features of the community courts have always been that civil and criminal cases flowing from the same set of facts were heard simultaneously. It is therefore accepted practice that the community courts would have jurisdiction with regard to criminal disputes. There is however great difference of opinion as to the scope thereof. Taking on criminal cases essentially means taking on

the responsibility of determining guilt and innocence, an adjudicatory function which would imply extensive coercive control and would require extensive training. A great amount of regulation will be needed and there should be clear boundaries about the type of cases dealt with and limits on the types of sentencing which they are capable of imposing. Since the civil and criminal aspects of dispute resolution in community courts are however so completely interlinked, it would not seem possible to discuss one aspect without the other.

The role of traditional courts and bringing them into the mainstream of a unified legal system is bedevilled by the political question with regard to the status of traditional leaders. In rural areas the traditional customary law is practiced by traditional authorities. The question arises what the interaction, if any, should be between community and traditional courts.

It is important to state that any project of this kind, regardless of its informality, should adhere to the principles of the Bill of Rights of the South African Constitution. In this sense, special care should be taken to reconcile the informality and different legal approach to conflict resolution with the principles guaranteed in the Constitution.

Issues to be debated are, amongst others, the following:

a) How, where and by whom should community courts be established?

b) Should community courts be regulated and controlled

– by the state, being an extension of the present justice system;
– by the community or Civic structures;
– jointly by the state and the community;
– by the local council or municipality;
– by the local authorities and communities; or
– by the Administration of Justice, Communities and the local authorities?

c) What should the functions of the community courts be ?

d)What should the jurisdiction of community courts be in so far as area, person and subject matter are concerned ?

e) What should the position with regard to officers of the community court be:

– is a presiding officer needed, who will it be, who will appoint or chose him?
– lay assessors: who will they be, who will appoint/choose them?
–clerk of the court: who will appoint him or her, jurisdiction, functions?

f) Who will enforce the decisions of the court and how will it be done?

g) What procedure should be followed: mediation, arbitration, conciliation or adjudication?

h) What role should witnesses, the community, lawyers and family play?

j) Should a record of decisions be held?

k) Judgment and orders.

l) Should appeal and review be allowed and by whom?

m) What should the relationship be between community and traditional courts?

n) How can minimum standards be ensured?[103]

The issues and options outlined above be debated thoroughly before any particular direction is embarked upon. Based on the outcome of such discussions legislation in respect of the incorporation of alternative dispute resolution techniques on various levels and community courts specifically have been proposed. It was found that it

[103] Alternative Dispute Resolution, South African Law Commission, Issue Paper 8, Project 94, 15 July 1997.

might be necessary to initiate different inquiries as the areas of prior investigation defined (see results above). The Commission discussed this issue in July 1997, however the above outlined scheme has not yet entered into force.

PART FIVE
The Initiatives of Alternative Dispute Resolution System in Hungary

The labor disputes, among them alternative dispute resolution methods, are regulated in the Hungarian Labor Code. The solutions of labor dispute can be divided into two groups: a) interest disputes (or in other words collective labor disputes and b) legal disputes (or other words individual labor disputes). The alternative dispute resolution methods were incorporated into the newly enacted Labor Code in 1992. The types of the alternative (or appropriate) dispute resolutions are as follows: a) mediation b) conciliation and c) arbitration.

1. Type of collective labor disputes

1.1. Conciliation

In a dispute arising in connection with employment between the employer and the factory council or between the employer (the organization representing the employer's interests) and the trade union that does not qualify as a legal dispute (collective labor dispute), there shall be *conciliatory negotiations* between the parties concerned. Conciliation commences upon the submission of the initiating party's written position to the other party. During the period of conciliation, which can be a maximum of seven days, the action serving as the basis of the dispute shall not be executed, and, furthermore, the parties shall refrain from all acts that may endanger agreement.[104]

2. Mediation

With a view to settling the conflict, the parties may avail themselves of the mediation of a person independent of them and not involved in the conflict. The participation of the mediator is jointly requested by the parties. For the duration of conciliation the mediator may request information or data from the parties to the extent he/she thinks necessary. In this event, the deadline of seven days will be replaced by a deadline prescribed for the provision of information or data, but the extension cannot exceed five days.

Upon completion of conciliation, the mediator will put the parties' positions and the results of the conciliation in writing and deliver them to the parties.[105]

3. Arbitration

The parties may, on the basis of an agreement thereto, avail themselves of an arbitrator to settle a labor dispute. The decision of the arbitrator is binding if the parties have in advanced subordinated themselves thereto in a written statement.

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[104] Articles 194 of the Act XXII of 1992 on Labour Code.
[105] Articles 195 of the Act XXII of 1992 on Labour Code.

The arbitrator may set up a conciliation committee, to which the parties delegate an equal number of representatives.

The arbitrator's procedure is obligatory in regard to disputes arising in connection with a) trade unions' right to publicity;[106] b) the cost of the operation of woks council;[107] and c) the works council's right to joint decision[108] in the event of an absence of understanding.

An agreement that has come into being in the course of conciliation or the arbitrator's decision is qualified as a collective agreement.

In the course of conciliation and arbitration, in agreement with the parties, experts or witnesses may be consulted.

Justified and necessary expenses arising in connection with the conciliation and the arbitration process are borne by the employer in the absence of agreement departing therefrom.[109]

2. The legal labor dispute

With the intention of asserting claims that arise from employment, the employee, the trade union and the factory council may initiate a legal dispute under the provisions of this law against an action (omission) of the employer in violation of the regulations pertaining to employment.

Unless this law stipulates otherwise, the employer may initiate a legal labor dispute towards the assertion of his claim related to employment.

A court of law decides legal disputes in labor relations.

A legal dispute in labor relations may be initiated against a decision adopted by the employer within his/her right of deliberation in the event that the employer has violated standard regulations in the course of making his decision.

The parties seek conciliation prior to going to court. In the course of conciliation, any accord reached by the parties qualifies as an agreement, which has to be put in writing.

In the event of an injurious measure taken by the employer, conciliation can be initiated in writing within fifteen days after notification or the implementation of the measure.

If conciliation has not yielded results within eight days of its initiation, it is then, with the exception of those provisions contained in Article 202, possible to turn to a court of law. With certain exceptions[110] a law suit does not have the force to delay the implementation of a measure.

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[106] Article 24, "The employer ensures opportunity for the trade union to make public information and appeals that it regards as necessary as well as the data related to its activities in a manner customary with the employer or in another appropriate way. By agreement with employer, the trade union is entitled to use the employer's premises after or during working hours for the purpose of activities that represent its interests."

[107] Article 63, "The employer ensure the justified and necessary costs for the election and operation of the factory council. The extent of this is jointly determined by the employer and the factory council. In the event of dispute, there is conciliation."

[108] Paras (1) of Article 65, "The works council has right of joint decision in regard to the utilization of welfare money specified in the collective agreement and in regard to the utilization of institutions and property of this nature."

[109] Articles 196–198 of the Act XXII of 1992 on Labour Code.

[110] See Article 23, Article 67, and points c) and d) of para (1) of Article 202 of Labour Code.

A law suit may be initiated within fifteen days of the establishment of the failure of conciliation, or of the expire of the eight days deadline specified in Article 201 in relation to:

a) a work contract modification implemented with the employer's one-sided action;

b) the cessation of employment, including termination based on mutual consent;

c) extraordinary notice and legal consequences[111] applied on account of the employee's breach of obligation;

d) payment notice[112] and a ruling prescribing compensation.[113]

If the employee files his/her suit against termination of employment or against legal consequences applied by the employee on account of a violation of obligation after the lapse of six months, he/she will not demand the restoration of his/her employment or his/her employment in the original position or work place. Furthermore, he/she can put in a claim only for wages for the six months preceding the filing of the suit.[114]

As we could see within the Hungarian labor legislation the so called alternative dispute resolution method is not widely accepted. We believe that in the future this situation will change in favor of these methods, which help to settle the labor dispute appropriately.

Brief summary

The purpose of alternative dispute resolution (ADR), in the field of labor law, is to increase the employees, trade unions, other workers' organizations and employers options in addressing their workplace-related disputes and to further the voluntary resolution of problems at the earliest opportunity. The Alternative Dispute Resolution program provides alternative avenues for solving institutional and interpersonal problems and conflicts. These alternative avenues include collaborative problem-solving and mediation.

[111] Article 109, "In the event of a grievous viloation by the employee of obligations arising from employment, the collective contract may, in addition to specifying the rules of procedure, also establish legal consequences in addition to those contained in Labour Code [para (1) Article 96]. The collective contract only estabdlishes, as a detrimental legal consequence, those disadvantages attached to employment that do not violate the employee's personal rights and human dignity. A pecuniary fine shall not be prescribed as a detrimental legal consequence. There is no measure containing detrimental legal consequences in relation to an employee if one year has already elapsed since the reprehensible breach of obligation. A measure entailing detrimental legal consequences is only carried out in a ruling justified in writing, which shall also contain information about the opportunity for legal redress. In a procedure aimed at the implementation of detrimental legal consequences, it is ensured that the employee be able to present his/her defence and to avail him/herself of a legal representative."

[112] Article 162, "In the event of the payment of wages without a legal basis, this may be reclaimed from the employee in writing within sixty days. Wages paid without a legal basis may be reclaimed within the general time for prescription, if the employee has recognized the lack of basis for the payment or if he/she him/herself caused it. The employer may assert its claim, by written notice, that the employee should repay the debts connected with his/her employment."

[113] Para (2) of Article 173, "A collective contract may determine the value to the extent of which the employer can directly oblige the employee to pay compensation. In this case the standard procedure for making compensation is also established."

[114] Articles 199–202 of the Act XXII of 1992 on Labour Code.

This article dealt with the basic issues of the ADR methods and presented a quick view about the recent systems in the USA, Australia, South Africa and Hungary. In the future we intend to continue this systematical introduction.

References

Allen, A. Dale, Jr. "Anatomy of Major Driving Accidents: Arbitration Factors." Labor Law Journal, vol. 47, no. 12, December 1996

Alternative Dispute Resolution, A Resources Guide, published by the United States Office of Personnel Management and the Equal Employment Opportunity Commission

Alternative Dispute Resolution, South African Law Commission, Issue Paper 8, Project 94, 15 July 1997

Babcock, Linda C. and Lowell J. Taylor. "The Role of Arbitrator Uncertainty in Negotiation Impasses." Industrial Relations: A Journal of Economy & Society, vol. 35, no. 4, October 1996

Butler & Finsen 14; Miller, J. "Alternative Dispute Resolution ('ADR) – common problems and misconceptions" 1996 62 Arbitration 186

Byars, Linda S. "Limiting an Arbitrator's Remedial Powers." Labor Law Journal, vol. 48, no. 1, January 1997

Cappelletti, M "Alternative dispute resolution processes within the framework of the world-wide access-to-justice movement" (1993) 56 The Modern Law Review 287

Cohen, T. " The insurance ombudsman – an alternative dispute resolution forum for the insurance industry" (1996) 8 SA Merc LJ 252

Corporate Legal Times – July 1995

Deitsch, Clarence R. and David A. Dilts. "Arbitration, Law and Economics: Not Such Strange Bedfellows." Labor Law Journal, vol. 48, no. 10, October 1996

DiGiovanni, Nicholas, Jr. "Arbitration and Grievance Preparation: Compulsory Arbitration of Discrimination Claims Under Collective Bargaining Agreements." In National Center for the Study of Collective Bargaining in Higher Education and the Professions, Higher Education Collective Bargaining: Back to "CB" Basics, edited by Beth Hillman Johnson, pp. 35–48. New York: National Center for the Study of Collective Bargaining in Higher Education and the Professions, School of Public Affairs, Baruch College, The City University of New York, 1996

Dika, Mihajlo and Zeljko Potocnjak. "Arbitration in Labor Disputes Under Croatian Law." Croatian Arbitration Yearbook, vol. 3, 1996

DOL, Report to the Secretary of Labor on the Philadelphia ADR Pilot Project

Elder, C. J. "Arbitration and Grievance Preparation: Grievance Preparation from the Union Perspective." In National Center for the Study of Collective Bargaining in Higher Education and the Professions, Higher Education Collective Bargaining: Back to "CB" Basics, edited by Beth Hillman Johnson, pp. 58–71. New York: National Center for the Study of Collective Bargaining in Higher Education and the Professions, School of Public Affairs, Baruch College, The City University of New York, 1996

Faris, J. "ADR, community dispute resolution and the court system" Community Mediation Update CDRT Newsletter No 10, April 1996

Finkin, Matthew W. "Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification, 17 Berkeley J. EMP. & Lab. L. 282, 1996

Fitzpatrick, Robert B. "Settlement of Employment Disputes: A Checklist." Corporate Analyst, vol. 9, no. 1, November 1996

Gorman, Robert A. "The Gilmer Decision and the Private Arbitration of Public Law Disputes", 1995 U. ILL. L. REV. 635

Gould IV, William B.: "Alternative dispute resolution and the National Labor Relations Board: some ruminations about emerging legal issues", National Labor Relations Board, Washington, D.C., 1997

Hancock, William A., ed. Corporate Counsel's Guide to Alternative Dispute Resolution in the Employment Context. 2nd ed. Chesterland, OH: Business Laws, 1996

Hebdon, Robert. "Public Sector Dispute Resolution in Transition." In Dale Belman, Morley Gunderson and Douglas Hyatt, eds., Public Sector Employment in a Time of Transition, pp. 85–125. Madison, WI: Industrial Relations Research Association, 1996

Hon Sir Brennan, Gerard "Professional Orientation: Business or Law?" Australian Law News, July 1990.

Hoyman & Stallworth, "The Arbitration of Discrimination Grievances in the Aftermath of Gardner"-Denver, 39 ARB. J. 49, September 1984

Industrial Relations Research Association. Proceedings of the Forty-Eighth Annual Meeting, edited by Paula B. Voos. Madison, WI: Industrial Relations Research Association, 1996

Jefferies, R. "Alternative dispute resolution and the Ombudsman" 62 Arbitration 67, 1996

Kuenzel, Robert V. "Alternative Dispute Resolution: Why All the Fuss?" Compensation & Benefits Review, vol. 28, no. 4, July–August 1996

"Legal Education and Professional Development – An Educational Continuum", American Bar Association, Chicago, July 1992

Liebert, Esther "Arbitration and Grievance Preparation. Grievance Preparation: A Management Perspective." In National Center for the Study of Collective Bargaining in Higher Education and the Professions, Higher Education Collective Bargaining: Back to "CB" Basics, edited by Beth Hillman Johnson, pp. 72–76. New York: National Center for the Study of Collective Bargaining in Higher Education and the Professions, School of Public Affairs, Baruch College, The City University of New York, 1996

Loughran, Charles S. How to Prepare and Present a Labor Arbitration Case: Strategy and Tactics for Advocates. Washington, DC: Bureau of National Affairs, 1996

Luk, JWK & Wijedoru, B. " A proposal for a more effective and efficient resolution system for international construction contracts" (1993) 59 Arbitration 100; Butler DW "Dispute resolution procedures" in Loots PC (ed) Construction law and related issues Juta 1995 1009; Luk, JWK & Wong, WT "The current practice of dispute resolution adviser (DRA) in the construction industry of Hong Kong" (1995) 61 Arbitration 253

Malin, Martin H. "Arbitrating Statutory Employment Claims" In the Aftermath of Gilmer, 40 St. Louis U. L.J. 77, 1996

Marburger, Daniel R. and John F. Scoggins. "Risk and Final Offer Arbitration Usage Rates: Evidence from Major League Baseball." Journal of Labor Research, vol. 17, no. 4, Fall 1996

Odams, M. " The influence of commerce on the changing face of dispute resolution" 62 Arbitration 277, 1996

Olson, Craig A. and Barbara L. Rau. "Learning from Interest Arbitration: The Next Round." Industrial and Labor Relations Review, vol. 50, no. 2, January 1997

Omar, AM "AFSA: The need for alternative dispute resolution" Address delivered at the opening of Arbitration House as extracted in 1996 9 Consultus 126

Report and Recommendations, Commission on the Future of Worker-Management Relations, December 1994

Resnik, Judith "Falling Faith: Adjudicatory Procedure in Decline" 53 U. Chi. L. Rev. 494, 511–12 1986

Rose, Joseph B. and Christine Manuel. "Attitudes Toward Collective Bargaining and Compulsory Arbitration." Journal of Collective Negotiations in the Public Sector, vol. 25, no. 3, 1996

Roth, B. – Wulff, R. – Coopers, C. "The alternative dispute resolution practice guide", at sec. 1:1, Lawyers Cooperative Publishing (1993), citing F. Kellor, American Arbitration: Its History, Functions, and Achievements, 3 [Port Washington, N.Y.: Kennikat Press (1948)]

Russo, Nicholas "Arbitration and Grievance Preparation: Arbitration in Faculty Higher Education." In National Center for the Study of Collective Bargaining in Higher Education and the Professions, Higher Education Collective Bargaining: Back to "CB" Basics, edited by Beth Hillman Johnson, pp. 49–57. New York: National Center for the Study of Collective Bargaining in Higher Education and the Professions, School of Public Affairs, Baruch College, The City University of New York, 1996

Siegel, Jay "Changing Public Policy: Private Arbitration to Resolve Statutory Employment Disputes", (1996 unpublished)

Slate, William K., II and George H. Friedman "Ten Things Not to Do When Designing an Employment ADR System." HR Advisor, January/February 1997

South African Law Commission Arbitration: A draft international arbitration act for South Africa Discussion Paper 69 1996

Stallworth & Malin, Conflicts Arising Out of Workforce Diversity, Proceedings of the 46th Annual Meeting of the National Academy of Arbitrators 104 (1994) and Christine Nicholson, Reconciling 'Alexander,' 'Gilmer' and 'Hawaiian Airlines' (unpublished paper for Georgetown University Law Center L.L.M., 1995)

Terrill, Thomas E. "The Americans with Disabilities Act and Labor Arbitration: Recent Awards." Labor Law Journal, vol. 48, no. 1, January 1997

U.S. Department of Labor, Alternative Dispute Resolution Steering Committee, Report to the Secretary of Labor on the Philadelphia ADR Pilot Project, 14 October 1992

U.S. Department of Labor (DOL), Annual Report for Fiscal Year 1992 (Washington, D.C., 1992)

Woods, Robert E. "What are the Benefits to Alternative Dispute Resolution?", Briggs and Morgan's handbook, "A Guide to Dispute Resolution.", Newsletter, Summer 1995